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Michael D. Moberly

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ARTICLE

MUST A FRIEND INDEED REVEAL A FRIEND'S MISDEED? EXPLORING THE MERITS OF A FRIENDSHIP PRIVILEGE

MICHAEL D. MOBERLY*

*"It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded."*¹

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I. INTRODUCTION

The fundamental objective of the American justice system is to ascertain the truth underlying litigated disputes.² Most modern evidence rules arose from and evolved in furtherance of this objective.³ Testimonial privileges, also commonly referred to as evidentiary privileges,⁴ are an exception.⁵

2. See *United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (“Truth is the essential objective of our adversary system of justice.”); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974) (“The foundation of our adversary system is the search to elicit the truth from witnesses concerning factual occurrences.”).

3. See *Ottinger v. Siegfried*, 349 F.2d 647, 649 (10th Cir. 1965) (“[A] lawsuit is a search for truth, and rules of evidence are designed and should be utilized to bring the whole truth of a case before the trier of the facts.”); *Dall. Cty. v. Commercial Union Assurance Co.*, 286 F.2d 388, 395 (5th Cir. 1961) (“If they are worth their salt, evidentiary rules are to aid the search for truth.”).

4. See *Lincoln Am. Corp. v. Bryden*, 375 F. Supp. 109, 111 (D. Kan. 1973) (referring to “the existence of a testimonial or evidentiary privilege created by statute or common law”); see also Sean A. Devlin, Comment, *Union Communications Privilege: Is It Time for Ohio to Protect Union Representative-Member Communications?*, 45 CAP. U. L. REV. 677, 679 n.13 (2017) (“Privileges are distinguished by testimonial or evidentiary privilege. Although commonly used interchangeably, there is a slight difference. Testimonial privilege is defined as ‘a right not to testify based on a claim of privilege; a privilege that overrides a witness’s duty to disclose matters within the witness’s knowledge, whether at trial or by deposition.’ Evidentiary privilege is defined as ‘a privilege that allows a specified person to refuse to provide evidence or to protect the evidence from being used or disclosed in a proceeding,’ and includes attorney-client privilege.” (citation omitted) (first citing *Testimonial Privilege*, BLACK’S LAW DICTIONARY (10th ed. 2014); then citing *Evidentiary Privilege*, BLACK’S LAW DICTIONARY (10th ed. 2014))).

5. See *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1253 (9th Cir. 1988) (“Unlike other rules of evidence, rules of privilege . . . are intended to further public policies and protect primary conduct extrinsic to the judicial process.”), *vacated on other grounds sub nom.*, *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989).

Although evidentiary in nature,⁶ privileges typically involve the protection of socially valuable relationships that have little or no relation to the courts' truth-seeking function.⁷ Indeed, by enabling witnesses to withhold relevant evidence,⁸ privileges often impede the judicial search for truth.⁹ For this and other related reasons,¹⁰ courts—and many modern evidence scholars¹¹—generally view testimonial privileges with disfavor.¹²

6. See *United States v. McVeigh*, 940 F. Supp. 1541, 1566 (D. Colo. 1996) (“[P]rivileges are evidentiary rules of exclusion”); *Ammerman v. Hubbard Broad., Inc.*, 551 P.2d 1354, 1356 (N.M. 1976) (“There can be no real question about rules of privilege being rules of evidence, when considered in the context of being exceptions to the general requirement and liability of everyone to give testimony or furnish evidence upon all facts inquired of in a court of justice.”).

7. See *Int’l Union, UAW v. Honeywell Int’l, Inc.*, 300 F.R.D. 323, 328 n.3 (E.D. Mich. 2014) (“[T]ruth-seeking is not the *only* interest or principle at stake in litigation; if it was, there would be no need for any privileges, the very purpose of which is to protect against the disclosure of information notwithstanding its relevance.”); *Montone v. Radio Shack*, 698 F. Supp. 92, 94–95 (E.D. Pa. 1988) (“[E]ach of the traditionally-recognized privileges . . . can be traced to an interest in fostering and protecting a relationship of high social importance.”).

8. See *Frank v. Allstate Ins. Co.*, 32 F. Supp. 3d 569, 574 (E.D. Pa. 2014) (“With evidentiary privileges, relevant information is withheld to serve the greater good of preserving confidential relationships or marital harmony.”); *Steiny & Co. v. Cal. Elec. Supply Co.*, 93 Cal. Rptr. 2d 920, 924–25 (Cal. Ct. App. 2000) (“Privileges authorize withholding of relevant evidence”).

9. See *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982) (“Each of the recognized privileges protects a substantial individual interest or a relationship in which society has an interest, at the expense of the public interest in the search for truth.”); *People v. Sanders*, 457 N.E.2d 1241, 1245 (Ill. 1983) (“[E]videntiary privileges . . . exclude relevant evidence and thus work against the truthseeking function of legal proceedings. In this they are distinct from [other] evidentiary rules, such as the prohibition against hearsay testimony, which promote this function by insuring the quality of the evidence which is presented.”); *State v. Heaney*, 689 N.W.2d 168, 174 (Minn. 2004) (“Unlike other rules of evidence that are concerned solely with the reliability of evidence and its ability to guide the court to the truth, privileges are an impediment to truth-finding.”).

10. See, e.g., *Tuite v. Henry*, 181 F.R.D. 175, 185 (D.D.C. 1998) (“[E]videntiary privileges are not designed to further litigation efficiency. Instead, privileges generally cause . . . delay and consume judicial resources in resolving claims of privilege that arise both at trial and during discovery, aspects of litigation which most rules of evidence seek to minimize.”).

11. See *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981) (“In recent times, commentators have tended to view privileges as hindering litigation and have generally advocated a narrowing of the field.”); *Bailey v. Chi., Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 572 (Iowa 1970) (Uhlenhopp, J., dissenting) (“[S]ince exclusionary rules necessarily prevent the jury from hearing some relevant information, contemporary authorities in the field of evidence resist extension of privileged communications to new professions and oppose expansion of existing privileges beyond necessity.”).

12. *RLI Ins. Co. v. Consecro, Inc.*, 477 F. Supp. 2d 741, 748 (E.D. Va. 2007) (“Courts disfavor assertions of evidentiary privilege because they shield evidence from the truth-seeking process.”); *Parvarandeh v. Goins*, 124 F.R.D. 169, 171 (E.D. Tenn. 1988) (“Courts do not favor creating new privileges”).

Despite this institutional bias,¹³ the concept of a witness being “privileged” to withhold evidence in certain situations (or concerning certain matters)¹⁴ is firmly embedded in American law.¹⁵ Some professional relationships, in particular, enjoy the protection of a testimonial privilege.¹⁶ Generally speaking, these privileges encourage and facilitate frank and open communications between individuals and the professionals from whom they seek counseling, advice, or medical treatment.¹⁷

13. See *In re Grand Jury Proceedings of Doe v. United States*, 842 F.2d 244, 246 (10th Cir. 1988) (“[T]he search for truth in society’s quest to administer justice creates a strong presumption against testimonial privileges because they result in the suppression of competent evidence.”); *Student 1 v. Williams*, 206 F.R.D. 306, 309 (S.D. Ala. 2002) (“American jurisprudence is firmly biased in favor of testimony and against privilege . . .”); *Rockford Police Benevolent & Protective Ass’n v. Morrissey*, 925 N.E.2d 1205, 1212 (Ill. App. Ct. 2010) (“[T]he judiciary has an institutional bias against creating a heretofore unknown privilege as a matter of common law.”).

14. See *People v. May*, 748 P.2d 307, 314–15 (Cal. 1988) (Mosk, J., dissenting) (“A privilege may grant an exemption from the duty to take the stand, as where the person involved is a criminal defendant or the spouse of a party. Or it may grant an exemption from the duty to give testimony on certain matters, such as facts that may tend to incriminate the witness or the substance of confidential communications in any of several protected relationships, including for example that of attorney and client.” (citation omitted)).

15. See *Elson v. Bowen*, 436 P.2d 12, 14 (Nev. 1967) (“The common law of evidence has long recognized certain rules of privilege which authorize the withholding of pertinent facts in a judicial proceeding.”); Nissa M. Ricafort, Note, *Jaffe v. Redmond: The Supreme Court’s Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege*, 32 IND. L. REV. 259, 260 (1998) (“One goal of the adversarial judicial system is to place all relevant evidence before the trier of fact. Although privileges impede this goal, they have been a part of the American judicial system since the founding of our country.” (footnote omitted) (citing Brian S. Faughnan, Comment, *Evidence—Jaffe v. Redmond: Establishing the “Psychotherapist–Patient Privilege” Under Rule 501 of the Federal Rules of Evidence*, 27 U. MEM. L. REV. 703, 705 (1997))).

16. See *In re Grand Jury*, 103 F.3d 1140, 1161 n.8 (3d Cir. 1997) (Mansmann, J., concurring in part and dissenting in part) (referring to the “professional testimonial privileges . . . between attorney and client, priest and penitent, and physician and patient”); Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 20 (“Most traditional privileges arise when a professional relationship is established: attorney-client, physician-patient or cleric-parishioner.”).

17. See *Admiral Ins. Co. v. United States Dist. Ct. of Ariz.*, 881 F.2d 1486, 1492 (9th Cir. 1989) (“The purpose of the attorney-client privilege is to encourage candid communications between client and counsel.”); *Urseth v. City of Dayton*, 653 F. Supp. 1057, 1064 (S.D. Ohio 1986) (“The purpose of the physician-patient privilege . . . is to encourage frankness and open communication between the patient and his or her physician.”); Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT’L & COMP. L.Q. 345, 350 (2001) (“[A]ll professional privileges have the same rationale—to encourage open communications between professionals and those with whom they have a professional relationship.”).

In addition, both the state and federal courts recognize a privilege protecting confidential communications between spouses,¹⁸ which is commonly known as the marital communications privilege.¹⁹ This testimonial privilege has existed since the mid-nineteenth century (if not longer),²⁰ and it promotes family harmony by encouraging people to communicate frankly and openly with their spouses.²¹

18. See *State v. Christian*, 841 A.2d 1158, 1173 (Conn. 2004) (“Our conclusion, recognizing the existence of a privilege for confidential marital communications, aligns us with every other jurisdiction in the country.”), *superseded by statute*, CONN. GEN. STAT. ANN. § 54-84a, as recognized in *State v. Bennett*, 324 Conn. 744 (2017); Katharine T. Schaffzin, *Beyond Bobby Jo Clary: The Unavailability of Same-Sex Marital Privileges Infringes the Rights of so Many More Than Criminal Defendants*, 63 U. KAN. L. REV. 103, 113 (2014) (“All state and federal jurisdictions in the United States recognize the confidential marital communications privilege in some form.”).

19. *United States v. Griffin*, 440 F.3d 1138, 1143–44 (9th Cir. 2006). This privilege “applies only to those marital communications which are confidential.” *United States v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990). A related “adverse spousal testimony” privilege enables a witness “to refuse to testify against a spouse, even about non-confidential communications or acts.” *Jimenez v. Amgen Mfg. Ltd.*, 692 F. Supp. 2d 219, 221 (D.P.R. 2010). However, the adverse spousal testimony privilege has “been subject to considerable criticism, and the empirical basis of the privilege has been seriously called into question.” *In re Grand Jury Matter*, 673 F.2d 688, 691 (3d Cir. 1982) (footnotes omitted). As a result, some states have abandoned the privilege, “relying solely on the marital communications privilege to protect marital privacy.” *State v. Mauti*, 3 A.3d 624, 632 n.7 (N.J. Super. Ct. App. Div. 2010). For a discussion of this issue, see David Medine, *The Adverse Testimony Privilege: Time to Dispose of a “Sentimental Relic”*, 67 OR. L. REV. 519, 521 (1988) (discussing the marital communications privilege).

20. The marital communications privilege has been described as “the second oldest testimonial privilege recognized at common law,” purportedly predated only by the attorney-client privilege. *United States v. Neal*, 532 F. Supp. 942, 945 (D. Colo. 1982) (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2333 (McNaughton rev. ed., 1961)). However, there is considerable uncertainty surrounding the origin of the privilege, which stems from the fact that at common law “one spouse was totally disqualified from testifying either for or against the other.” *People v. D’Amato*, 430 N.Y.S.2d 521, 522 (N.Y. App. Div. 1980). This testimonial disqualification eliminated any “practical need for a separate rule dealing just with confidential marital communications.” *Brown v. State*, 753 A.2d 84, 91 (Md. 2000). Thus, while the marital communications privilege may have existed in practice at early common law, it does not appear to have been formally recognized until the English Evidence Amendment Act of 1853 “abolished the testimonial disqualification of husbands and wives.” *State v. Hurley*, 876 S.W.2d 57, 62 (Tenn. 1994), *superseded by statute*, TENN. CODE ANN. § 24-1-201(b), as recognized in *State v. Power*, 101 S.W.3d 383 (Tenn. 2003); see *State v. Pratt*, 153 N.W.2d 18, 20–21 (Wis. 1967) (“While some early legal scholars conceived and articulated the policies supporting the privilege for marital communications, judicial recognition was virtually nonexistent until 1853 since the wider disqualification of incompetency left little opportunity for the question of the existence of such a privilege to be considered.”).

21. *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir. 1974); see Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1358–59 (1973) (“As is true of any of the communication privileges, . . . protecting against involuntary disclosure of confidential marital communications is intended primarily to encourage such communication and thereby to preserve and foster an intimate relationship between spouses.”).

There also appears to be growing support for a broader array of family privileges,²² with numerous commentators advocating for some form of parent-child privilege,²³ which has been adopted by statute or judicial decision in several states²⁴ and recognized by a few federal courts.²⁵ Some commentators have asserted that there is a colorable basis for recognizing a comparable sibling privilege.²⁶ However, the courts have not been receptive to the latter argument,²⁷ and with rare

22. See *Under Seal v. United States*, 755 F.3d 213, 219 n.6 (4th Cir. 2014) (“New York state courts have recognized a privilege against divulging private familial communications, with emphasis on the privacy of the family unit.”); Norman Abrams, *Unpacking the Power of an Ante-Litigation Limitation on Consultation-for-Advice/Treatment Evidentiary Privileges*, 21 QUINNIPIAC L. REV. 1089, 1126 (2003) (“A . . . general category of situations to which [a] proposed new privilege might be applicable involve familial relationships—particularly the parent-child situation, but sometimes involving siblings and on occasion, even more distant relationships.”).

23. See *In re Grand Jury*, 103 F.3d 1140, 1158 (3d Cir. 1997) (Mansmann, J., concurring in part and dissenting in part) (referring to the “spate of articles by academicians and other legal commentators who, virtually uniformly, favor incorporating a parent-child testimonial privilege into the fabric of the law”). For the author’s contribution to this dialogue, see Michael D. Moberly, *Children Should Be Seen and Not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona*, 35 ARIZ. ST. L.J. 515 (2003).

24. See *Grand Jury*, 103 F.3d at 1162 (Mansmann, J., concurring in part and dissenting in part) (“Three states (Idaho, Massachusetts and Minnesota) have adopted some variant of the parent-child privilege by statute, and one state, New York, has judicially recognized the privilege.” (footnote omitted)).

25. See, e.g., *In re Grand Jury Proceedings, Unemancipated Minor Child*, 949 F. Supp. 1487, 1497 (E.D. Wash. 1996) (“[T]he Court concludes that reason and experience, as well as the public interest, are best served by the recognition of some form of a parent-child privilege.”); see also *In re Grand Jury Proceedings of Doe*, 842 F.2d 244, 247 (10th Cir. 1988) (noting how the District Court of Nevada and the District Court of Connecticut “have recognized a parent child or family privilege”).

26. See Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1167 (2007) (observing the rationale for recognizing a parent-child privilege “could be applied to . . . intrafamilial privileges between brothers and sisters”); Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 924 (1987) (“To be sure, a case can be made for extending a testimonial privilege to siblings . . . who, like parents and children, have a tie of kinship that is associated with lifelong fidelity.”) [hereinafter *Parent-Child Loyalty*]; see also Michael D. Moberly, *Am I My Brother’s Secret-Keeper? Contemplating the Recognition of a Sibling Testimonial Privilege*, 41 AM. J. TRIAL ADVOC. 239, 308–09 (2017) (discussing how *Jaffe v. Richmond*, 518 U.S. 1 (1996) opened the possibility of a sibling privilege because siblings rely on each other for guidance).

27. See *State v. Wright*, 378 N.W.2d 727, 733 (Iowa Ct. App. 1985) (“There is no authority establishing a privilege for sibling communications and we are unwilling to find such a privilege exists.”). But see *Port v. Heard*, 594 F. Supp. 1212, 1219 (S.D. Tex. 1984) (“If the law of intrafamily privilege were extended beyond the narrow spectrum of spousal privilege, it would be very difficult to stop at the parent-child level. This is so since the . . . argument could then be logically extended to brothers, sisters, grandparents, cousins, nieces, nephews, aunts, and uncles.”).

exceptions,²⁸ no other family relationships are protected by a testimonial privilege.²⁹

There is also no testimonial privilege protecting confidential communications between friends.³⁰ This fact is so, despite the undeniable societal importance of friendship³¹ and the fact that, like the relationships that typically *are* protected by a testimonial privilege,³² friendships may benefit by the participants' ability to maintain the confidentiality of their communications,³³ or—perhaps of equal importance—be harmed by their

28. See, e.g., *In re Ryan*, 474 N.Y.S.2d 931, 932 (N.Y. Fam. Ct. 1984) (extending New York's common law parent-child privilege to an individual's confidential communications with a grandparent who stood "in the place and stead of his parent."); see also Sarah Tupper, Note, *Taking the Ninth: A Victim's Right of Privacy*, 28 WASH. U. J.L. & POL'Y 457, 476 (2008) ("A very small number of decisions have recognized some form of intra-family, non-spousal, testimonial privilege.").

29. See *United States v. Penn*, 647 F.2d 876, 885 (9th Cir. 1980) ("There is no judicially or legislatively recognized general 'family' privilege . . ."); Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 355 n.52 (1996) ("[T]he privilege not to testify does not extend to siblings or more remote relations."); Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 645 ("American law does not recognize a sibling privilege, let alone other kinship privileges.").

30. See *United States v. Lockwood*, 386 F. Supp. 734, 738 (E.D.N.Y. 1974) ("Courts have not, in general, recognized any privilege of a . . . friend to refuse to testify on grounds analogous to those underlying the husband-wife privilege."); *Bryant v. Livigni*, 619 N.E.2d 550, 555 (Ill. App. Ct. 1993) ("The law does not recognize a 'friendship privilege.'"); Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 699 (2007) ("Our relationships with our spouses (and our children and parents in some jurisdictions) . . . are protected from discovery in public proceedings, but our communications with our best friends have no such protection."); Stacey A. Garber, Note, *Cox v. Miller: The Clergy Privilege and Alcoholics Anonymous*, 31 CAP. U. L. REV. 917, 926 (2003) (asserting "confidential communications made to friends . . . are not privileged").

31. See Markel et al., *supra* note 26, at 1205 ("[O]ur society values friendship as a very beneficial social relationship of trust but fails to entrust friends with testimonial privileges . . ."); Peter P. Gelzinis, Note, *Do Friends Need the Law? Examining Why Friendship Matters and What Governments Can Do for This Important, Though Overlooked, Relationship*, 45 SUFFOLK U. L. REV. 523, 524 (2012) ("Laws give special preference to family members through . . . testimonial privileges for spouses, . . . but the law overlooks the important role that friends have in our lives.").

32. See *Estate of Kime v. Barnard*, 193 Cal. Rptr. 718, 725 (Cal. Ct. App. 1983) ("[T]he purpose of the attorney-client privilege is to preserve and enhance the confidential relationship between attorney and client. . . ."); *Curran v. Pasek*, 886 P.2d 272, 275 (Wyo. 1994) ("[T]he confidential marital communication privilege . . . enhances the quality of marital relationships by encouraging confidential communication between spouses."). See generally Ellen Deason, Note, *The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L. REV. 405, 427 (1984) (noting traditionally recognized privileges "function to protect and enhance a relationship").

33. See Ferdinand Schoeman, *Friendship and Testimonial Privileges*, in *ETHICS, PUBLIC POLICY, & CRIMINAL JUSTICE* 257, 264 (Frederick Elliston & Norman Bowie eds., 1982) (asserting an "attribute of ideal friendship is that the friends can reliably trust one another with information about themselves even if it reveals problems with their character"); Lewis H. Margolis, *Taking Names: The Ethics of Indirect Recruitment in Research on Sexual Networks*, 28 J.L. MED. & ETHICS 159, 161 (2000) ("[C]onfidentiality is

inability to do so.³⁴ Indeed, while courts occasionally pay lip service to the value of friendship,³⁵ the relationship remains largely unprotected in American law.³⁶ And unlike the parent-child privilege,³⁷ which has received a great deal of (mostly favorable)³⁸ scholarly attention,³⁹ there has been very little scholarly consideration of a possible friendship privilege.⁴⁰

a basic component of . . . friendship and other intimate social relationships, although not guided by the same formal expectations as occur in a professional setting.”).

34. See *United States v. Finazzo*, 583 F.2d 837, 841 (6th Cir. 1978) (“Friendship is frustrated . . . when our confidences are . . . publicly disclosed.”), *vacated on other grounds*, 441 U.S. 929 (1979); Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 111 n.117 (1987) (“Honest testimony may strain a valued friendship.”); cf. Gelzinis, *supra* note 31, at 543 (“[O]ne who has betrayed the trust and intimacy of a friend seems particularly worthy of condemnation . . .”).

35. See *Piscottano v. Murphy*, 317 F. Supp. 2d 97, 106 (D. Conn. 2004) (“[T]he Court does not intend in any way to demean or belittle the value of friendship and fellowship.”); *Strong v. United States*, 665 A.2d 194, 201 (D.C. 1995) (Ferren, J., dissenting) (“Friendship can be a powerful relationship.”); Michael J. Kaufman, *The Value of Friendship in Law and Literature*, 60 FORDHAM L. REV. 645, 646 (1992) (asserting the law “has exploited the language of friendship, while debasing the value of friendship”).

36. See *Baskin v. Bogan*, 766 F.3d 648, 660 (7th Cir. 2014) (“[M]any people want to enter into relations that government refuses to enforce or protect (friendship being a notable example).”; *Frost v. Lawrence*, 122 N.Y.S. 913, 914 (N.Y. App. Div. 1910) (“The law does not attempt to regulate the relation of friendship of either men or women.”); Sarah Baumgartel, *Privileging Professional Insider Trading*, 51 GA. L. REV. 71, 107 (2016) (“The supposed duty of confidentiality among . . . friends is not otherwise recognized in law, so their conversations are in no way shielded from public discovery.”); Kaufman, *supra* note 35, at 650 (asserting “a subtle pattern has developed in the law within which the value of friendship implicitly is either ignored or rejected”).

37. See generally J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 896 (“A parent-child privilege . . . would seem quite logical as a companion measure to the marital privilege. A privilege for intimate friends . . . is not a logical companion measure to the marital privilege because such relationships, even when involving much affection, have characteristics that distinguish them from familial bonds.”).

38. See *In re Inquest Proceedings*, 676 A.2d 790, 791 (Vt. 1996) (noting “commentators have argued in favor of a parent-child privilege”); Jessica Perry, Note, *The Parent-Child Testimonial Privilege: An Argument for Qualified Recognition*, 37 BRANDEIS L.J. 97, 105 (1999) (“[P]ublic policy arguments in favor of creating the parent-child privilege abound from legal commentators and academics.”).

39. See *In re Grand Jury Proceedings*, 103 F.3d 1140, 1146 (3d Cir. 1997) (“[T]he myriad of law review articles discussing the parent-child testimonial privilege”; *People v. Dixon*, 411 N.W.2d 760, 762 (Mich. Ct. App. 1987) (“In recent years, the subject of establishing a parent-child testimonial privilege has received considerable scholarly attention.”).

40. See Gelzinis, *supra* note 31, at 548 (asserting “the value of friendship has been overlooked by serious thinkers”); Andrew Jensen Kerr, *Coercing Friendship and the Problem with Human Rights*, 50 U.S.F. L. REV. F. 1, 4 (2015) (lamenting the fact “we have survey courses, law reviews, and court systems dedicated to the legal protection and regulation of the family, but—until very recently—have generally ignored friendship”); Leib, *supra* note 30, at 703 (asserting the law of testimonial privilege is a “legal domains where more sensitivity to friendship could be usefully developed to protect a friendship’s privilege of privacy”).

This article is a modest attempt to fill that void.⁴¹

Part I of the article explains that a friendship privilege was not among the privileges recognized at common law. In Part II, the author discusses the courts' authority to create new, previously unrecognized testimonial privileges. The author examines the renowned Wigmore test for recognizing new common law privileges in Part III of the article. Part IV notes that a few scholars favor the recognition of a friendship privilege, and Part V explores the potential impact of the Supreme Court's seminal decision in *Jaffee v. Redmond*⁴² on that possibility. Part VI identifies a significant definitional impediment to the recognition of a friendship privilege and discusses some potential responses to that problem. The author ultimately concludes that there is at least a colorable basis for recognizing a friendship privilege, and calls for further judicial and academic consideration of that possibility.

II. NO FRIENDSHIP PRIVILEGE EXISTED AT COMMON LAW

The concept of a testimonial privilege came to this country as part of the common law of England,⁴³ where it arose in response to the courts' emerging authority (nonexistent until the sixteenth century)⁴⁴ to compel witnesses to testify.⁴⁵ Although it has been suggested that "a form of the

41. See generally Gelzinis, *supra* note 31, at 548 ("Maybe our approach to thinking about friends is starting to change. Scholars of both philosophy and law are beginning to think seriously about the place friends have in our lives. Lawmakers should pick up this conversation."); R.A. Lenhardt, *According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER, RACE & JUST. 741, 766 (2013) ("Legal scholars have focused on questions of friendship in recent years.").

42. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

43. See *Cook v. King Cty.*, 510 P.2d 659, 661 (Wash. Ct. App. 1973) (describing privilege as a "common law concept"); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1457 (1985) (footnote omitted) ("By the early 1800s, English courts had begun to develop a common law of evidentiary privileges, and American judges tentatively looked to this emerging law to help them decide privilege questions.") [hereinafter *Developments in the Law*]; Philip A. Elmore, Comment, "That's Just Pillow Talk, Baby": *Spousal Privileges and the Right to Privacy in Arkansas*, 67 ARK. L. REV. 961, 964 (2014) ("American courts adopted evidentiary privileges from English common law, where certain privileges were recognized as early as the sixteenth century.").

44. See *United States v. Gecas*, 120 F.3d 1419, 1441 (11th Cir. 1997) (observing that "all nonparty witness testimony was voluntary until the mid-sixteenth century"); *In re Marshall*, 805 N.W.2d 145, 151 (Iowa 2011) ("Common law in the fifteenth century did not recognize the right to compel a witness to testify in criminal proceedings. Over time, however, the common law evolved to the point where witnesses had a duty to testify and could be compelled to do so.").

45. See *In re Contempt of Wright*, 700 P.2d 40, 47 (Idaho 1985) (Bistline, J., concurring) ("The concept of privilege arose in England in the 1600's. It developed only after witnesses could be

friendship idea underlies the early justification for the privileged communication rule in the law of evidence,”⁴⁶ relatively few testimonial privileges actually existed under English common law,⁴⁷ and a privilege for confidential communications between friends was not among them.⁴⁸ One court described the situation in the following terms:

For too long to make it worthwhile to investigate, and in too many cases to make it worthwhile to recite, the law has limited the matters as to which a witness may claim a privilege not to testify. And . . . a witness has no legal right to refuse relevant information merely because in furnishing it he will betray a friend, or inform against a confidant.⁴⁹

compelled to testify.”); *Howe v. Detroit Free Press, Inc.*, 487 N.W.2d 374, 386 (Mich. 1992) (Boyle, J., concurring in part and dissenting in part) (“At common law, the rules of privilege were developed as a protection against the court’s power to compel testimony.”).

46. Robert J. Condlin, “*What’s Love Got to Do with It?*” “*It’s Not Like They’re Your Friends for Christ’s Sake*”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 212 n.5 (2003); see also Leib, *supra* note 30, at 659 (“Some . . . suggest that vast swaths of our legal system are themselves predicated on friendship, and that our law would not be possible without an underlying conception of friendship undergirding it.”).

47. See *Terre Haute Reg’l Hosp., Inc. v. Trueblood*, 600 N.E.2d 1358, 1360 (Ind. 1992) (“Most privileges were unknown at common law . . .”); Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 260–61 (2005) (“[A]t common law, very few privileges were defined and recognized.”).

48. One court went so far as to assert there “were no privileges at common law,” and all privileges instead “arise, if at all, statutorily.” *Harlan v. Lewis*, 141 F.R.D. 107, 109 (E.D. Ark. 1992); see also *Hyde Constr. Co. v. Koehring Co.*, 455 F.2d 337, 345 (5th Cir. 1972) (Godbold, J., concurring in part and dissenting in part) (asserting that “the whole concept of privilege” was “largely unknown to the common law”). Although this is an exaggeration, it has been credibly argued that “the only privileges recognized at common law were the attorney-client and marital privileges.” Devlin, *supra* note 4, at 684.

49. *United States v. Worcester*, 190 F. Supp. 548, 567 (D. Mass. 1960); cf. *State v. McKnight*, 243 A.2d 240, 250 (N.J. 1968) (“A man could not escape his confession to a friend or relative because he thought . . . the friend or relative could not testify against him.”). But see *Commonwealth v. Blood*, 507 N.E.2d 1029, 1033 (Mass. 1987) (citation omitted) (quoting *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769)):

At common law “[i]t is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.” . . . Thus, it has long been thought reasonable to expect that what is supposedly said only to friends or close associates will not become generally, indiscriminately known . . . without the speaker’s consent.

III. THE COURTS' AUTHORITY TO CREATE NEW TESTIMONIAL PRIVILEGES

Despite the common law underpinnings of American privilege law,⁵⁰ modern courts are not limited to applying only those privileges that existed under English common law.⁵¹ In this regard, Rule 501 of the Federal Rules of Evidence,⁵² enacted in 1975⁵³ as part of a comprehensive codification of federal evidence law,⁵⁴ expressly authorizes the federal courts to adopt new common law privileges.⁵⁵

50. See, e.g., *Marshall v. Anderson*, 459 So. 2d 384, 386 n.7 (Fla. Dist. Ct. App. 1984) (“[V]irtually the entire federal law of privilege is based upon the common law rather than either rule or statute.”); see also *Peterson v. Chesapeake & Ohio Ry. Co.*, 112 F.R.D. 360, 363 (W.D. Mich. 1986) (noting “much of the law of privileges is uniquely judge-made”); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 246 (1998) (“Throughout the history of the common law, judges have created privileges to protect important societal interests.”).

51. See, e.g., *United States v. Williams*, 55 F. Supp. 375, 376 (D. Minn. 1944) (“Federal courts are not bound by the common-law rules which governed a . . . privilege to testify in 1789 or any other year Federal courts can expand or contract these common-law rules as modern experience and necessity demand in the interest of justice.”) (construing *Funk v. United States*, 290 U.S. 371 (1933)); see also *Mullen v. United States*, 263 F.2d 275, 279 (D.C. Cir. 1959) (“When reason and experience call for recognition of a privilege which has the effect of restricting evidence the dead hand of the common law will not restrain such recognition.”).

52. Rule 501 states, in relevant part, that—unless otherwise provided by the United States Constitution, a federal statute, or a Supreme Court rule—“[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege” in federal cases. FED. R. EVID. 501. See Comment, *In the Light of Reason and Experience: Rule 501*, 71 Nw. U. L. REV. 645 (1976) (providing an early examination of the rule).

53. Rule 501 has been amended once, in 2011, but the changes “were meant to be stylistic only.” *State Farm Mut. Auto. Ins. Co. v. Kugler*, 840 F. Supp. 2d 1323, 1329 n.8 (S.D. Fla. 2011); see also *Executive Mgmt. Servs. Inc. v. Fifth Third Bank*, 309 F.R.D. 455, 459 n.1 (S.D. Ind. 2015) (“Rule 501 was amended only stylistically in 2011, without intent to change a result in any ruling.”).

54. See *Coy v. Renico*, 414 F. Supp. 2d 744, 768 (E.D. Mich. 2006) (“In 1975, Congress codified the Federal Rules of Evidence, gathering together the disparate common law evidentiary rules that had been developed by the federal courts.”); *Gilman v. Choi*, 406 S.E.2d 200, 209 (W. Va. 1991) (Neely, C.J., concurring in part and dissenting in part) (“The *Federal Rules of Evidence* are merely a judicial codification of common law principles, and remain part and parcel of the common law.”), *overruled in part on other grounds by* *Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87, 94 (W. Va. 1994).

55. See *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004) (“The creation of new common law evidentiary privileges is authorized by Fed. R. Evid. 501”); *In re Int'l Horizons, Inc.*, 689 F.2d 996, 1003 (11th Cir. 1982) (“Rule 501 clearly provides federal courts with the statutory power to recognize new or ‘novel’ evidentiary privileges.”).

Several states have adopted similar rules,⁵⁶ effectively codifying their own courts' common law authority to recognize new privileges.⁵⁷ Both state and federal courts have exercised this authority to expand the number of existing privileges.⁵⁸ Notable examples include the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*,⁵⁹ and the priest-penitent (or as it is now commonly called, clergy-communicant)⁶⁰ privilege recognized by several state and federal courts,⁶¹ and all but certain to be recognized by the Supreme Court, if it is ever directly presented with the issue.⁶² While the courts seem destined to continue this "evolutionary

56. See, e.g., *City of Tucson v. Superior Ct.*, 809 P.2d 428, 430 (Ariz. 1991) ("The Arizona version of Rule 501 is very similar to Rule 501 of the Federal Rules of Evidence."); *State v. Roach*, 669 N.E.2d 1009, 1010 (Ind. Ct. App. 1996) (noting "the similarity in language between Rule 501 of the Federal Rules of Evidence and Rule 501 of the Indiana Rules of Evidence"); *State v. Smorgala*, 553 N.E.2d 672, 676 (Ohio 1990) ("The [Ohio] rule adopts the same approach to privilege as is found in Fed. Evid. R. 501.").

57. See Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598, 598 n.1 (1983) ("Several states have adopted versions of Rule 501 which empower the state courts to develop common law rules governing . . . privilege.").

58. See, e.g., *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1302 (Fed. Cir. 2016) ("We find, consistent with Rule 501 of the Federal Rules of Evidence, that a patent-agent privilege is justified 'in the light of reason and experience.'" (quoting FED. R. EVID. 501)); *United States v. Wimberly*, 60 F.3d 281, 285 (7th Cir. 1995) ("This Court has . . . adopted a psychotherapist/patient privilege under Fed. R. Evid. 501." (citing *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996)); *In re Production of Records to Grand Jury*, 618 F. Supp. 440, 441 (D. Mass. 1985) ("[T]his court recognizes, as a matter of federal evidentiary law, a qualified privilege for . . . communications made to a social worker in his or her professional capacity . . . insofar as the communication relates to the care and treatment of the patient."); *Senear v. Daily Journal-Am.*, 641 P.2d 1180, 1184 (Wash. 1982) ("We hold there is a common law qualified privilege for journalists in civil cases.").

59. *Jaffee v. Redmond*, 518 U.S. 1 (1996); see also Section V *infra* (discussing the *Jaffee* case).

60. See, e.g., *Commonwealth v. Stewart*, 690 A.2d 195, 197 n.1 (Pa. 1997) ("Pennsylvania courts have commonly referred to the privilege as the 'priest-penitent' privilege. This term is used in a representative rather than a limiting manner We adopt the term 'clergy-communicant' privilege for purposes of this Opinion."); see also *United States v. Burgess*, No. 1:14-CR-2022-TOR, 2015 WL 13674174, at *2 (E.D. Wash. Mar. 4, 2015) ("Although not explicitly listed in Rule 501, several courts have recognized the existence of the clergy-communicant privilege, sometimes referred to as the priest-penitent privilege.").

61. See, e.g., *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990) ("[W]e hold that a clergy-communicant privilege does exist."); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, No. CV 93 302072, 1995 WL 348181, at *2 (Conn. Super. Ct. May 31, 1995) ("[T]his court holds, as a matter of common law, that confidential communications made by or to a member of the clergy in his or her religious capacity are privileged from disclosure"); see also *Nestle v. Commw.*, 470 S.E.2d 133, 137 (Va. Ct. App. 1996) (explaining although there is some debate over the issue, "most scholars conclude that the priest-penitent privilege is not a part of England's common law legacy").

62. *In re Grand Jury*, 918 F.2d 374, 382 (3d Cir. 1990) (citing *Trammel v. United States*, 445 U.S. 40, 45 (1980) ("The Supreme Court has 'acknowledged the existence of a 'priest-penitent' privilege."); see also *United States v. Durham*, 93 F. Supp. 3d 1291, 1295–96 (W.D. Okla. 2015) ("There is no Tenth

development of testimonial privileges,”⁶³ friendship may not be among the relationships likely to benefit from this evolution.⁶⁴

IV. WIGMORE’S TEST FOR RECOGNIZING NEW PRIVILEGES

A. Background

Despite widespread agreement that the law recognizes no friendship privilege,⁶⁵ case law addressing the issue is relatively sparse.⁶⁶ The few courts to have considered the issue have typically refused to recognize the privilege without offering any meaningful analysis in support of their decisions.⁶⁷ Indeed, the Pennsylvania Court of Common Pleas’ decision in *McMillen v. Hummingbird Speedway, Inc.*⁶⁸ might be the only notable

Circuit authority outlining the scope of any clergy-communicant privilege, but the Court has little difficulty concluding that the Supreme Court would acknowledge such a privilege, having [previously] done so in *dicta* . . .” (citing *Trammel*, 445 U.S. at 45)).

63. *Trammel*, 445 U.S. at 47; see also *New York Times Co. v. Gonzalez*, 382 F. Supp. 2d 457, 505 (S.D.N.Y. 2005) (“Rule 501 . . . was intended to allow for the evolution of the common law and the development of new privileges as a result.”), *vacated on other grounds*, 459 F.3d 160 (2d Cir. 2006); *D’Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1355 n.2 (D.N.J. 1995) (“Rule 501 endorses ‘a continuation of the evolution of a federal common law of privileges which began long before the Rules of Evidence were enacted.’” (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 172, at 226 (2d ed. 1994))); *In re Agosto*, 553 F. Supp. 1298, 1324 (D. Nev. 1983) (“Rule 501 recognized and arguably even advocated the evolution of new testimonial privileges as they were deemed necessary by courts in the future.”).

64. See Kaufman, *supra* note 35, at 655 (stating the “relationships which the law in various states has valued enough to protect with an evidentiary privilege have . . . expanded greatly,” but “the relationship among friends is still absent”).

65. See, e.g., *Evans v. Vare*, 203 F. App’x 95, 97 (9th Cir. 2006) (“A relationship between friends is not privileged.”); see *Brannon v. Finkelstein*, No. 10-61813-CIV-GRAHAM/O’SULLIVAN, 2012 U.S. Dist. LEXIS 145171, at *4 (S.D. Fla. Oct. 9, 2012) (indicating “communications between friends” are “not privileged communications”); see also *supra* note 30 and accompanying text.

66. See generally Gelzinis, *supra* note 31, at 533 (“There is scant case law dealing directly with the nature of friendship . . .”); Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 533 (2008) (“In contrast to families and lovers, friendships have been systematically ignored by the law in many areas . . .”).

67. This phenomenon is not unique to the potential friendship privilege. See, e.g., Gregory W. Franklin, Note, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big for Its Britches?*, 26 WM. & MARY L. REV. 145, 166 (1984) (“Many courts that have refused to recognize the [parent-child] privilege have done so without thorough analysis.”).

68. *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010). See Mallory Allen & Aaron Orheim, *Get Outta My Face[book]: The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 WASH. J.L. TECH. & ARTS 137, 146–48 (2012) (providing a previous discussion of *McMillen*).

exception.⁶⁹

McMillen arose out of a stock car racing accident in which the plaintiff claimed to have suffered significant injuries, some of which were allegedly permanent.⁷⁰ The defendants sought access to the plaintiff's social media sites,⁷¹ arguing that posts on those sites might contain evidence relevant to his claimed injuries.⁷² The plaintiff refused to provide the requested access,⁷³ asserting that his private communications with his "friends"⁷⁴ on

69. The Pennsylvania courts may lack the constitutional authority to recognize new common law privileges. *See, e.g., Tannenbaum v. May Dep't Stores Co.*, 65 Pa. D. & C.2d 700, 702 (C.P. Allegheny Cty. 1974) ("Power to prescribe rules of evidence and, per extenso, rules creating privileges not to testify, was specifically denied to Pennsylvania courts by the Constitutional Convention of 1967–68 during the debate on the Judiciary Article, Resolution No. 1000, Con. Con. 1968."). *But see In re Pittsburgh Action Against Rape*, 428 A.2d 126, 136 (Pa. 1981) (Larsen, J., dissenting) ("[I]here can be no serious doubt that courts have the common law authority to judicially create testimonial privileges."). If that is the case, the *McMillen* court's discussion of the merits of a friendship privilege may have relatively little impact in jurisdictions in which the courts do possess such authority. *See Moses v. Albert Einstein Med. Ctr.*, 25 Phila. Cty. Rptr. 389, 406 (Pa. C.P. 1993) ("[E]ach state is free to enact her own privileges, and typically does so in a common law and/or legislative manner.").

70. *See McMillen*, 2010 WL 4403285, at *1 (describing underlying facts in the case).

71. The defendants served interrogatories on the plaintiff asking him whether he "belonged to any social network computer sites and, if so, that he provide the name of the site(s), his user name(s), his login name(s), and his password(s)." *Id.* This is a common litigation tactic; one prominent authority in the field has asserted that in the age of social media "by far the most contentious—and rapidly developing—area of discovery disputes centers around the extent to which a party seeking discovery can obtain direct and unfiltered access to its opponent's social networking profile through the production of the resisting party's Facebook password or other social networking site login credentials." John G. Browning, *With "Friends" Like These, Who Needs Enemies? Passwords, Privacy, and the Discovery of Social Media Content*, 36 AM. J. TRIAL ADVOC. 505, 508 (2013).

72. *McMillen*, 2010 WL 4403285, at *1–2. Summarizing the defendants' position, the court stated:

Accessing only the public portion of his Facebook page, . . . the defendants have discovered posts they contend show that [the plaintiff] has exaggerated his injuries. Certainly a lack of injury and inability is relevant to their defense, and it is reasonable to assume that [the plaintiff] may have made additional observations about his travels and activities in private posts not currently available to the defendants.

Id. at *11.

73. *See id.* at *1.

74. *See, e.g., Chace v. Loisel*, 170 So. 3d 802, 803 (Fla. Dist. Ct. App. 2014) ("The word 'friend' on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger."); *Sluss v. Commonwealth*, 381 S.W.3d 215, 222 (Ky. 2012) ("[S]ome people have thousands of Facebook 'friends,' . . . which suggests that many of those relationships are at most passing acquaintanceships. This is further complicated by the fact that a person can become 'friends' with people to whom the person has no actual connection, such as celebrities and politicians.").

social media were “confidential and thus protected against disclosure.”⁷⁵ The court characterized this argument as an assertion that those communications were privileged.⁷⁶

Analyzing the issue under Dean John Henry Wigmore’s “classic utilitarian formulation of the conditions for recognition of a testimonial privilege,”⁷⁷ the *McMillen* court concluded that the inherently public nature of communications on social media⁷⁸ “is wholly incommensurate with a claim of confidentiality,”⁷⁹ as would be required in order to warrant recognition of the privilege under the Wigmore test.⁸⁰ Given the unique—and

75. *McMillen*, 2010 WL 4403285, at *3; cf. *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 662 (D.N.J. 2013) (“Facebook has customizable privacy settings that allow users to restrict access to their Facebook content. Access can be limited to the user’s Facebook friends, to particular groups or individuals, or to just the user.”); *Sluss*, 381 S.W.3d at 227 n.12 (“Facebook users may opt to make all or part of their Facebook information private, or they may opt to make this information public.”).

76. See *McMillen*, 2010 WL 4403285, at *3 (“[The plaintiff] asks the Court to recognize communications shared among one’s private friends on social network computer sites as confidential and thus protected against disclosure. Because [the applicable rule] only makes privileged materials non-discoverable, he is essentially asking the Court to recognize a privilege for those communications.”); cf. *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 85 n.10 (W. Va. 1994) (Cleckley, J., concurring) (“[C]omplete confidentiality can generally be guaranteed only if an evidentiary privilege . . . applies.” (quoting *MUELLER & KIRKPATRICK*, *supra* note 63 § 5.2, at 336)).

77. *Am. Civil Liberties Union, Inc. v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981) (discussing *WIGMORE*, *supra* note 20 § 2285, at 527); see also *Douglas v. Windham Sup. Ct.*, 597 A.2d 774, 777 (Vt. 1991) (“Most courts have created a testimonial privilege only when the conditions meet the four-part test for recognition set forth in Dean Wigmore’s treatise.” (citing *WIGMORE*, *supra* note 20, § 2285, at 527)).

78. See *Stroes v. Town of Davie*, No. 18-62760-CIV-MORENO/SELTZER, 2019 U.S. Dist. LEXIS 87188, at *7 (S.D. Fla. May 22, 2019) (“Courts throughout the country have repeatedly highlighted the public nature . . . of social media postings.”); Douglas H. Amster et al., *#Litigation: Blogs, Tweets, Pokes, and Tags in the Courtroom*, 44 BRIEF 50, 55 (2015) (discussing “the fundamentally public nature of social networking sites”).

79. *McMillen*, 2010 WL 4403285, at *9; cf. Patricia Sánchez Abril & Anita Cava, *Health Privacy in a Techno-Social World: A Cyber-Patient’s Bill of Rights*, 6 NW. J. TECH. & INTELL. PROP. 244, 255 (2008) (“The online social networking environment has brought about a sweeping change in its users’ notions of intimacy, friendship, and confidentiality Consequently, the level of confidentiality users expect is almost impossible to assess without explicit requests or privacy settings.”).

80. See *In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1012 n.13 (D.N.J.) (“Wigmore’s test requires that the communications originate in a confidence that they will not be disclosed.”), *aff’d*, 879 F.2d 857 (3d Cir. 1989); *State v. Post*, 826 P.2d 172, 181 (Wash. 1992) (“As with all the evidentiary privileges, a person may not claim a privilege as to communications that do not originate in the confidence that they will not be disclosed.”).

tenuous⁸¹—nature of social media friendships,⁸² there is nothing particularly surprising about this result.⁸³ However, because social media friendships “do not necessarily carry the same weight as true friendships,”⁸⁴ the *McMillen* court’s analysis has no clear application to more traditional friendships,⁸⁵ which may well satisfy the Wigmore test.⁸⁶

B. *The First Prong of the Test*

The Wigmore test consists of the following four criteria:

81. See, e.g., *Law Offices of Herssein & Herssein v. United Servs. Auto. Ass’n*, 271 So. 3d 889, 896 (Fla. 2018) (“[I]t is regularly the case that Facebook ‘friendships’ are more casual and less permanent than traditional friendships.”); see also Ira P. Robbins, *Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13 MINN. J.L. SCI. & TECH. 1, 12 n.54 (2012) (“Social-networking users can ‘unfriend’ others with whom they are friends. This action removes both users from each other’s friends list.”) (citation omitted). In fact, the practice of “unfriending” is so common that the term “was recognized by the Oxford American Dictionary as the word of the year in 2009.” Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 189 (2012).

82. See *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 67 n.16 (D. Mass. 2016) (“Over a billion people use Facebook and connect with other users as ‘friends.’ Some may be friends in the traditional sense, but others are no more than acquaintances or contacts or in some cases may even be complete strangers.”); *Sluss v. Commonwealth*, 381 S.W.3d 215, 223 (Ky. 2012) (“[A] Facebook member may be ‘friends’ with someone in a strictly artificial sense.”); see also *Wint v. Comm’r of Soc. Sec.*, 16-cv-6250 (BMC), 2017 WL 3927460, at *4 (E.D.N.Y. Sept. 7, 2017) (“Facebook friends are different than in-person friends . . .”).

83. Cf. *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (“[M]aterial posted on a ‘private’ Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged . . .”); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (N.Y. App. Div. 2011) (“[P]ostings on [a] plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because [the] plaintiff used the service’s privacy settings to restrict access . . .”). See generally *Amster et al.*, *supra* note 78, at 54–55 (“[N]o court to date has credibly recognized a ‘social media privilege’ . . .”).

84. *Sluss*, 381 S.W.3d at 222; see also *Law Offices of Herssein & Herssein*, 271 So. 3d at 897 (“Since the creation of a Facebook ‘friendship’ in itself does not signal the existence of a traditional ‘friendship,’ it certainly cannot signal the existence of a close or intimate relationship.”); Benjamin P. Cooper, *Judges and Social Media: Disclosure as Disinfectant*, 17 SMU SCI. & TECH. L. REV. 521, 523 (2014) (“[P]eople generally understand that social media ‘friendship’ is less significant than traditional friendship . . .”).

85. See *Law Offices of Herssein & Herssein*, 271 So. 3d at 901 (Pariente, J., dissenting) (“[A]ny attempt to equate Facebook ‘friendship’ with traditional friendship ultimately fails. The fact that both are called ‘friendship’ does not mean they are comparable or can be evaluated in the same manner.”).

86. See *Covey*, *supra* note 37, at 881 n.20 (“[S]ome argue that relationships between close friends . . . might . . . qualify for privilege status under the Wigmore test.”); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1230 (1962) (“[R]elationships ranging from personal friendship to psychiatrist and patient . . . seem to meet the four Wigmore criteria.”) [hereinafter *Functional Overlap*].

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.⁸⁷

Addressing the confidentiality requirement embodied in the first prong of the test,⁸⁸ the *McMillen* court concluded that the nature of social media communications in general,⁸⁹ and the privacy policies of Facebook and MySpace in particular,⁹⁰ “dispel any notion that information one chooses to share [on those sites], even if only with one friend, will not be disclosed to anybody else.”⁹¹ The court noted, for example, that information contained in users’ communications on social media can be “disseminated by the friends with whom they share it,”⁹² which alone may warrant the conclusion that a user can have no reasonable expectation that such communications will remain confidential.⁹³

87. Walker v. Huie, 142 F.R.D. 497, 500 (D. Utah 1992) (quoting WIGMORE, *supra* note 20 § 2285, at 527) (emphasis omitted).

88. *McMillan v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285, at *3 (Pa. Ct. Com. Pl. Sept. 9, 2010); *see also* State *ex rel.* Chandra v. Sprinkle, 678 S.W.2d 804, 810 (Mo. 1984) (en banc) (Welliver, J., dissenting) (“Perhaps the best approach for determining when the public interest demands that a communication remain confidential is the four-pronged test established by Professor Wigmore. First, there must be a communication between parties made with the understanding that the communication be kept confidential.”).

89. *See* Rachel E. Lusk, *Facebook’s Newest Friend—Employers: Use of Social Networking in Hiring Challenges U.S. Privacy Constructs*, 42 CAP. U. L. REV. 709, 710 (2014) (“[S]ocial media sites have opened what would otherwise be a private conversation between friends . . . to others, often without the speaker’s knowledge or consent to share that information.”).

90. *See generally* Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. 2010) (“[N]either Facebook nor MySpace guarantee complete privacy . . .”).

91. *McMillen*, 2010 WL 4403285, at *3–4.

92. *Id.* at *4; *see also* Garner K. Weng, *Type No Evil: The Proper Latitude of Public Educational Institutions in Restricting Expressions of Their Students on the Internet*, 20 HASTINGS COMM. & ENT. L.J. 751, 809 (1998) (“People familiar with the Internet are aware that messages are easily forwarded. In some cases, it may appear that the message sender knew that the message could or would be forwarded to many others.”).

93. *See McMillen*, 2010 WL 4403285, at *3 (“[W]hile it is conceivable that a person could use [social network computer sites] as forums to divulge and seek advice on personal and private matters,

In addition, Facebook's privacy policy contains language cautioning users that "whomever else a user may or may not share certain information with, Facebook's operators have access to every post[.]"⁹⁴ and may disclose the information contained in those posts "pursuant to subpoenas, court orders, or other civil or criminal requests."⁹⁵ Noting that MySpace's policies contain similar language,⁹⁶ the *McMillen* court concluded that "no person choosing MySpace or Facebook as a communications forum could reasonably expect that his communications would remain confidential, as both sites clearly express the possibility of disclosure."⁹⁷

The *McMillen* court found support for its conclusion in cases finding no testimonial privilege exists where otherwise confidential communications occur in the presence of third parties.⁹⁸ Extending the reasoning of these cases to the social media context, the court stated:

The law does not even protect otherwise privileged communications made in the presence of third parties. When a user communicates through Facebook or MySpace, however, he or she understands and tacitly submits to the possibility that a third-party recipient, i.e., one or more site operators, will also be receiving his or her messages, and may further disclose them if the operator deems disclosure to be appropriate.⁹⁹

it would be unrealistic to expect that such disclosures would be considered confidential."); *cf.* *United States v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012) (concluding an individual's "legitimate expectation of privacy ended when he disseminated posts to his 'friends' because those 'friends' were free to use the information however they wanted").

94. *McMillen*, 2010 WL 4403285, at *4.

95. *Id.*

96. *See id.* at *5 (noting MySpace's policies advise users that it "may choose to monitor users' content or conduct, thereby explicating the fact of the operators' unfettered access to a member's communications").

97. *Id.*; *see also* *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 656 (Sup. Ct. 2010) (concluding Facebook and MySpace users have "no legitimate reasonable expectation of privacy").

98. *See* *Logan v. Oliver*, 96 A.2d 516, 517 (D.C. 1953) ("[C]ommunications made in the presence of a third party . . . are not confidential and therefore not privileged."); *State v. Topps*, 142 So. 3d 978, 981 (Fla. Dist. Ct. App. 2014) ("Generally, communications made in the presence of third parties, whose presence is known to the [communicant], are not privileged from disclosure.").

99. *McMillen*, 2010 WL 4403285, at *5 (citation omitted); *cf.* Catherine B. Sarson, Note, *The Child-Parent Testimonial Privilege: Attempts at Codification Have Missed Their Mark*, 12 GEO. J. LEGAL ETHICS 861, 879 (1999) ("The first condition of [the Wigmore] test requires that the communication be made with the expectation that it would remain confidential. Courts have enforced this requirement, disallowing a privilege where the information was revealed to a third person.") (footnote omitted).

While this analogy may be apt insofar as social media friendships are concerned,¹⁰⁰ it does not readily apply to communications between friends in other contexts.¹⁰¹ Although the issue is fact-sensitive,¹⁰² communications between friends often occur in private,¹⁰³ and any suggestion that friends can never expect their communications to remain confidential is unfounded,¹⁰⁴ as the *McMillen* court itself clearly recognized.¹⁰⁵ One commentator explained this in the following terms:

Maintenance of confidentiality in regard to communications between close personal friends depends very much upon the kind of people involved, their ability to maintain confidences and the nature of their relationship. Although

100. See, e.g., *Romano*, 907 N.Y.S.2d at 657 (“[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. . . . Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.”).

101. See *Condlin*, *supra* note 46, at 267 (“True friends keep their friends’ confidences. One can unburden one’s soul to a true friend.”); *Gelzinis*, *supra* note 31, at 543 (“[W]e expect that we can trust our friends, that they will keep what we tell them in confidence”); cf. *Nucci v. Target Corp.*, 162 So. 3d 146, 154 (Fla. Dist. Ct. App. 2015) (noting postings on social networking sites “are unlike . . . communications . . . where disclosure is confined to narrow, confidential relationships”).

102. See Jeffrey Begens, Comment, *Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?*, 11 U. DAYTON L. REV. 709, 721 (1986) (“Confidentiality determinations turn on the facts of the particular case . . .”).

103. See *Padilla v. Terhune*, 309 F.3d 614, 619 (9th Cir. 2002) (describing an individual who “made [an] admission to . . . a close friend, in a private setting”); *Dow Chem. Co., Tex. Div. v. NLRB*, 660 F.2d 637, 650 (5th Cir. 1981) (discussing an individual’s “statements . . . to personal friends in private conversations”); Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249, 1270 (2012) (“Friendships . . . can involve disclosures meant to be kept private; a person might confess, for example, to having racist thoughts to a very close friend but to no one else.”); see also *Leyson v. Davis*, 42 P. 775, 782 (Mont. 1895) (referring to “the unobtrusive confidence and privacy of close friendships”).

104. See *United States v. Evans*, 113 F.3d 1457, 1466 (7th Cir. 1997) (referring to the “confidentiality . . . which might be expected as between friends discussing troubling circumstances”); *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888, 891 (Mass. App. Ct. 1999) (“Where one discusses sensitive personal matters with a . . . trusted friend, one can often legitimately expect that these matters will remain confidential.”); *Dairy Queen of Duncanville, Inc. v. O’Quinn*, 502 S.W.2d 889, 891 (Tex. App.—Dallas 1973) (“There is no limit to the number of confidences two friends may share, and these may be of the most intimate nature.”).

105. See *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285, at *5 (Pa. Ct. Com. Pl. Sept. 9, 2010) (“[O]ne may expect that his or her friend will hold certain information in confidence . . .”).

there is no doubt that in many situations the requisite degree of confidentiality can be maintained, this will depend on the specific circumstances.¹⁰⁶

C. *The Second Prong of the Test*

The second prong of the Wigmore test is its most important component.¹⁰⁷ It focuses on whether confidentiality is essential to the maintenance of the relationship between the parties seeking the protection of the privilege under consideration.¹⁰⁸ As one court observed, “the theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege.”¹⁰⁹

Addressing this issue, the *McMillen* court concluded that confidentiality “is not essential to maintain the relationships between and among social network users.”¹¹⁰ Once again, this observation is undoubtedly correct.¹¹¹ However, the court then proceeded to assert—far less convincingly¹¹²—

106. Abrams, *supra* note 22, at 1127; see also Mitchell A. Agee, Note, *Friends in Low Places: How the Law Should Treat Friends in Insider Trading Cases*, 7 CHARLESTON L. REV. 345, 377–78 (2013) (“While some highly committed ‘friends’ may share personal confidences or intimacy, more casual ‘friends’ may only exchange pleasantries or exist on the basis of fun without sharing personal confidences or intimacy.”).

107. *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 144 (Pa. 1981) (Larsen, J., dissenting); see Edward J. Imwinkelried, *The Dangerous Trend Blurring the Distinction Between a Reasonable Expectation of Confidentiality in Privilege Law and a Reasonable Expectation of Privacy in Fourth Amendment Jurisprudence*, 57 LOY. L. REV. 1, 9 (2011) (“The paramount criterion is Wigmore’s requirement that ‘confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.’” (quoting WIGMORE, *supra* note 20 § 2285, at 527–28)).

108. See *In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1012 n.13 (D.N.J.) (“Wigmore’s second requirement is that confidentiality be essential to the full and satisfactory maintenance of the relationship between the parties.”), *aff’d*, 879 F.2d 857 (3d Cir. 1989); Franklin, *supra* note 67, at 168 (“The second part of Wigmore’s test requires that confidentiality be essential to the relationship.”).

109. *In re Penn Cent. Commercial Paper Litig.*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973); cf. Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 454 (2016) (“[P]eople disclose more when they trust. When they believe that the other party is trustworthy, they are more likely to share, just as they do with their doctors, lawyers, and spiritual advisors.”).

110. *McMillen*, 2010 WL 4403285, at *5.

111. See Amster et al., *supra* note 78, at 55 (“[U]nlike an attorney-client or physician-patient relationship, confidentiality between social network users is not essential to maintaining their online relationship; in fact, the opposite is true.”).

112. See generally Hoge v. George, 200 P. 96, 102 (Wyo. 1921) (asserting that “trust and confidence . . . is the essence of [close] friendship”); Charles Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968) (“To be friends . . . persons must be intimate to some degree with each other. But intimacy is the

that the same is true of more traditional friendships.¹¹³ It reasoned as follows:

No [privilege protecting communications between friends] currently exists. Friendships nonetheless abound and flourish, because whereas it is necessary to guarantee people that their attorneys, physicians, and psychologists will not disseminate the substance of their discussions in order to encourage the type and level of disclosure essential to those professional relationships, history shows that the same guarantee is not necessary to encourage the development of friendships.¹¹⁴

This analysis is unpersuasive.¹¹⁵ It mirrors the analysis in *In re Grand Jury Proceedings*,¹¹⁶ where the Third Circuit concluded that “confidentiality—in the form of a testimonial privilege—is not essential to a successful parent-child relationship, as required by the second [Wigmore] factor.”¹¹⁷ The court reasoned that “strong and trusting parent-child relationships . . . have existed throughout the years without the concomitant existence of a privilege protecting that relationship.”¹¹⁸

sharing of information about one’s actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone.”).

113. See *McMillen*, 2010 WL 4403285, at *5 (“The relationships to be fostered through [social] media are basic friendships, not attorney-client, physician-patient, or psychologist-patient types of relationships, and . . . the maintenance of one’s friendships typically does not depend on confidentiality.”).

114. *Id.* at *6; cf. Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 26 (2011) (“Since most social network communications are based on friendships and social relationships, not attorney-client, physician-patient, or psychologist-patient types of relationships, they cannot be considered privileged.”).

115. See *Glorsky v. Wexler*, 59 A.2d 233, 235 (N.J. Ch. 1948) (“Friendships . . . are fragile things and it is not always possible to keep them in constant repair.”); cf. *United States v. Byrd*, 750 F.2d 585, 589 (7th Cir. 1985) (stating that privileges “protect those interpersonal relationships which are highly valued by society and peculiarly vulnerable to deterioration”).

116. *In re Grand Jury Proceedings*, 103 F.3d 1140 (3d Cir. 1997).

117. *Id.* at 1152; cf. Covey, *supra* note 37, at 897 n.149 (“Some commentators . . . argue against the [parent-child] privilege, claiming that . . . a privilege would add nothing to the permanency of the relationship and thus is unnecessary.”).

118. *In re Grand Jury Proceedings*, 103 F.3d at 1157 (internal quotation marks omitted); see also *State v. Maxon*, 756 P.2d 1297, 1301–02 (Wash. 1988) (“It appears highly doubtful to us that a parent-child privilege would encourage . . . disclosure, or that the absence of such a privilege would impair the success of a given parent-child relationship Bonds other than shared secrets typically hold the parent-child relationship together.”).

However, this is not necessarily an accurate characterization of the parent-child relationship,¹¹⁹ let alone the relationship between friends.¹²⁰ Indeed, the Third Circuit's reasoning failed to persuade one of the judges in that case¹²¹ who favored the recognition of a parent-child privilege that would "bar compelled testimony concerning confidential communications made to [a] parent by his child in the course of seeking parental advice and guidance."¹²² The Third Circuit's reasoning also has not prevented other federal courts from recognizing a parent-child privilege,¹²³ and it similarly fails to provide a compelling rationale for refusing to recognize a friendship privilege.¹²⁴

Indeed, the same argument that prompted the Third Circuit to decline to recognize a parent-child privilege has been made in opposition to the marital

119. See Catherine Chiantella Stern, Note, *Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent-Child Privilege and a Proposal to Amend Article V*, 99 GEO. L.J. 605, 622 (2011) ("With respect to the second factor [of the Wigmore test], which mandates that confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties, many courts oversimplify the parent-child relationship and too easily dismiss the relevance of confidentiality to the maintenance of a strong parent-child relationship.").

120. See *Israel v. Portland News Pub. Co.*, 53 P.2d 529, 532 (Or. 1936) ("It is common knowledge that people do not confide their short-comings except to their very closest friends and only to friends in whom they have the utmost confidence."); cf. LILLIAN B. RUBIN, *JUST FRIENDS: THE ROLE OF FRIENDSHIP IN OUR LIVES* 22–23 (1985) (asserting that "friendships require a level of care and attention for their maintenance in ways that kin do not."); Covey, *supra* note 37, at 897 n.149 (asserting that "even the closest of friendships . . . may end at any time"). See generally William S. Bailey, *Flawed Justice: Limitation of Parental Remedies for the Loss of Consortium of Adult Children*, 27 SEATTLE U. L. REV. 941, 955 (2004) ("While . . . social friendships may be transitory, the parent-child bond is remarkably durable, lasting a lifetime.").

121. For a comprehensive comparison of the conflicting opinions in the *Grand Jury Proceedings* case, see A. Shane Weldon, Comment, *In re Grand Jury: Refusal of Federal Courts to Recognize a Parent-Child Testimonial Privilege*, 28 AM. J. TRIAL ADVOC. 465, 480–95 (2004). The author of that article observed that although "the parent-child relationship has survived to this point in time without a privilege, society continues to change, and . . . the parent-child relationship is in danger." *Id.* at 496.

122. *In re Grand Jury Proceedings*, 103 F.3d at 1165 (Mansmann, J., concurring in part and dissenting in part).

123. See *Under Seal v. United States*, 755 F.3d 213, 218 (4th Cir. 2014) ("Only a very small handful of federal district courts in this country have recognized the parent-child privilege.").

124. See *Richards & Hartzog*, *supra* note 109, at 453 ("[T]rue friendship is based upon . . . personal disclosures and experiences. . . . In other words, the quality of friendships is defined by the extent to which we trust each other with personal disclosures."); cf. Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 729 n.261 (2009) ("I do not think saying that friendship can survive an occasional legal incursion actually undermines the idea that legal protection can usefully help friendship as an institution.").

communications privilege,¹²⁵ and yet, even if valid,¹²⁶ it has had no discernible impact on that universally recognized privilege.¹²⁷ One court explained this in the following terms:

The argument traditionally advanced in support of the marital communications privilege is that the privilege is needed to encourage marital confidences, which confidences in turn promote harmony between husband and wife Thus it must be assumed that spouses will know of the privilege and take its protection into account in determining to make marital confidences, or at least, which is not the same thing, that they would come to know of the absence of the privilege if it were withdrawn and be, as a result, less confiding than at present.¹²⁸

125. For example, the Indiana Supreme Court stated:

An attorney, physician, or priest is in a position to elicit information by assuring the client, patient, or penitent of the confidential nature of the communications. The existence of the privilege thus facilitates open communications to these professionals. The notion that spouses are encouraged to communicate by reason of the privilege seems highly questionable.

Glover v. State, 836 N.E.2d 414, 421 (Ind. 2005); see also Teri S. O'Brien, Comment, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?*, 1977 ARIZ. ST. L.J. 411, 428 ("Marriage encompasses the totality of a relationship between two individuals and is based on mutual trust and devotion. It is unrealistic to assume that couples confide in one another because they are certain what they say will never be revealed in court.").

126. See generally Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members*, 70 ST. JOHN'S L. REV. 693, 723 n.140 (1996) (quoting WIGMORE, *supra* note 20 § 2332, at 642).

The only argument against recognition of the [husband-wife] privilege is based on the proposition that . . . the occasional compulsory disclosure in court of even the most intimate marital communications would not in fact affect to any perceptible degree the extent to which spouses share confidences. Whether this argument is well founded is not, and probably cannot be, known.

Id.

127. See Maine v. Smith, 384 A.2d 687, 691 (Me. 1978) ("In the . . . typical case, no express invocation of confidentiality will occur; nevertheless, from the nature of the communication and the surrounding circumstances, it is apparent that the spouses assume that the communication is and will remain confidential."); Franklin, *supra* note 67, at 168 ("The longevity of the marital privilege suggests that couples probably are aware, at least in a vague way, that marital confidences have legal protection."); Sarson, *supra* note 99, at 864 ("Critics argue that . . . full disclosure between spouses results, not from the protection afforded by [a] privilege, but rather from the pre-existing trust inherent in the relationship However, the spousal privilege has been maintained nonetheless [D]espite the fact that spouses may be unaware that the marital privilege exists, the confidentiality of [their] communication[s] is essential to the maintenance of the marital relationship.").

128. People v. Fisher, 503 N.W.2d 50, 58 (Mich. 1993) (quoting 1 CHARLES T. MCCORMICK, EVIDENCE § 86, at 309–10 (4th ed. 1992)); see also Weldon, *supra* note 121, at 497 ("absence of the

Because cases in which parents and children are forced to testify against one another have begun to receive widespread public attention,¹²⁹ many observers believe the recognition of a parent-child privilege would receive similar attention,¹³⁰ and thereby influence the manner in which parents and children communicate with one another.¹³¹ The same presumably would be true of a friendship privilege.¹³² In this respect, the unsubstantiated

marital privilege could promote a serious lack of open communication between spouses"). Professor Thomas Krattenmaker dismissed the contention that "privileges should depend for their existence on an empirical finding, or hunch, that the communicants are expressly aware that their conversations are privileged." Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 653 (1976). He asserted that "[s]uch an argument incorrectly assumes that subconscious, unarticulated knowledge never can influence human conduct" when there actually is "little reason to doubt that these privileges provide at the very least a subconscious backdrop to the exercise of the right of privacy." *Id.* at 653-54; *cf. In re Grand Jury Proceedings*, 103 F.3d 1140, 1160 n.6 (3d Cir. 1997) (Mansmann, J., concurring in part and dissenting in part) ("While it is true . . . that few children are likely to be aware of a privilege *per se*, there is, in any event, a certain expectation that this information will not be disclosed.").

129. See, e.g., Ricafort, *supra* note 15, at 292 n.309 (asserting that the "absence of any parent-child privilege became a matter of public and political outcry when Independent Counsel Kenneth Starr subpoenaed Monica Lewinsky's mother to testify . . ." during the Whitewater investigation (quoting Daniel J. Capra, *Laws of Evidentiary Privilege*, N.Y. LAW J., May 8, 1998, at 3, col.1)); see also *Parent-Child Loyalty*, *supra* note 26, at 922 ("Cases in which prosecutors attempt to compel parent-child testimony are widely reported by the media, and they make clear to parents and children that their relationships . . . are not protected by the law.").

130. See Franklin, *supra* note 67, at 168 ("If [the] courts recognize a parent-child privilege, it too will become known through its application."); *cf. Nora V. Demleitner, More Than "Just" Evidence: Reviewing Mirjan Damaska's Evidence Law Adrift*, 47 AM. J. COMP. L. 515, 529 (1999) (referring to recent "increased publicity for those supporting parent-child testimonial immunity"). The law's failure to recognize a broadly applicable parent-child privilege may be attributable at least in part to the fact that until relatively recently "the average American probably did not think that courts could force people to testify against their parents or children." Shonah P. Jefferson, Note, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429, 430 (1999).

131. See Brittany Libson, Note, *Promoting Parental Guidance: An Argument for the Parent Child Privilege in Juvenile Adjudications*, 53 AM. CRIM. L. REV. 137, 168 (2016) ("A statutory privilege would . . . promote open communication between children and parents by providing notice that the privilege exists and clear guidance on its application."). *But cf. Susan Levine, Comment, The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 787 (1979) ("[T]he child-parent privilege . . . even if known to those protected by it, will not appreciably increase communication in a family in which trust and openness do not already exist."). See generally Covey, *supra* note 37, at 899 ("Some observers question whether a testimonial privilege would actually affect family structures, yet any effect would likely be positive . . .") (footnote omitted).

132. See Leib, *supra* note 30, at 699 (describing the "Monica Lewinsky affair . . ." as a "highly publicized example where intimacies between friends were required to be exposed"). See generally Levine, *supra* note 131, at 786 n.134 ("[I]t is likely that a greater percentage of the populace in today's litigious society is aware of the existence of a privilege.").

assertion that laypersons are generally unfamiliar with their privileges,¹³³ which appears to have provided one of the principal bases for the Third Circuit's rejection of a parent-child privilege,¹³⁴ provides a more compelling argument for informing the public of any newly recognized friendship privilege than it does for declining to recognize that privilege.¹³⁵

D. *The Third Prong of the Test*

The third prong of the Wigmore test focuses on whether the relationship to be protected by the proposed privilege "is one which society should foster."¹³⁶ Addressing this question, the *McMillen* court indicated only that it could not say "the community seeks to sedulously foster friendships by recognizing friend-to-friend communications as confidential or privileged."¹³⁷ This tautological observation, which suggests the only relationships which should be protected by a testimonial privilege are those

133. See *Developments in the Law*, *supra* note 43, at 1475 ("The simplest response to the claim that the average person knows little about her privileges is that the body of available data, scanty as it is, does not support such an assertion.").

134.

[I]t is not clear whether children would be more likely to discuss private matters with their parents if a parent-child privilege were recognized than if one were not. It is not likely that children, or even their parents, would typically be aware of the existence or non-existence of a testimonial privilege covering parent-child communications.

In re Grand Jury Proceedings, 103 F.3d 1140, 1152 (3d Cir. 1997); *cf.* *State v. Maxon*, 756 P.2d 1297, 1302 (Wash. 1988) ("If recognized, such a privilege would probably not encourage parent-child communications if for no other reason than that it is unlikely many children would be aware of such a rule."). See generally David L. Cheatham, Comment, *Kids Say the Darndest Things: A Call for Adoption of a Statutory Parent-Child Confidential Communications Privilege in Response to Tougher Juvenile Sentencing Guidelines*, 8 TEX. WESLEYAN L. REV. 393, 398 n.32 (2002) ("Opponents of the parent-child privilege argue that . . . most parents and children are not aware of the privilege's existence or non-existence At least one proponent has conceded that perhaps the idea has 'logical appeal . . . since the average layman presumably is not concerned with the law of evidence . . .'" (quoting Betsy Booth, Comment, *Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege*, 36 SW. L.J. 1175, 1180 (1983))).

135. See Krattenmaker, *supra* note 128, at 653 ("[I]f we assume unawareness of a privilege, the more sensible response would be to favor wider dissemination of information concerning the privilege, not abolition of the underlying right.").

136. *Maxon*, 757 P.2d at 1302; see also *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266, 269 (D. Utah 1992) (discussing Wigmore's view that "only those privileges should be recognized which protect a relationship sedulously to be fostered").

137. *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285, at *10 (Pa. Ct. Com.Pl. Sept. 9, 2010).

that already are protected by such a privilege,¹³⁸ is a mischaracterization of the Wigmore test,¹³⁹ which was intended to establish the conditions under which *new* privileges should be recognized.¹⁴⁰

More fundamentally, the *McMillen* court's observation ignores the evolutionary nature of American privilege law.¹⁴¹ At least in federal question cases (and in states that follow the federal model by leaving the recognition of privileges to common law development),¹⁴² courts "can and indeed should recognize new privileges when appropriate."¹⁴³ Even in states that do not follow the federal model,¹⁴⁴ state legislatures (and perhaps

138. See *Flores v. Ardent Co.*, 95 Va. Cir. 368, 370 (Va. Cir. Ct. 2017) ("[T]rial courts have no authority to create a privilege where no such privilege otherwise exists."); cf. Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441, 1459–60 (2002) ("Wigmore believed there should be no evidentiary privileges, but certain evidentiary privileges already existed. As a result, Wigmore argued that no new privileges should be created and the few existing privileges should be restricted or, at the very least, not broadened.") (footnotes omitted).

139. See Michael B. Bressman & Fernando R. Laguarda, *Jaffee v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV. 319, 320 (1999) ("[S]ome privileges . . . have gained clear acceptance. The question is whether other privileges should join their ranks. In answering this question, courts typically consider the four criteria formulated by Dean Wigmore.") (footnote omitted). But see *Allred v. State*, 554 P.2d 411, 428 (Alaska 1976) (Dimond, J., concurring) ("Professor Wigmore apparently developed his cannons to explain privileges then accepted.").

140. See *Walker v. Huie*, 142 F.R.D. 497, 500 (D. Utah 1992) ("Professor Wigmore . . . described four criteria which are useful in analyzing and determining whether [a] court should create a new evidentiary privilege . . ."); *In re Oct. 1985 Grand Jury No. 746*, 530 N.E.2d 453, 459 (Ill. 1988) (Clark, J., dissenting) (referring to "the four conditions proposed by Dean Wigmore as necessary for the establishment or recognition of a new privilege").

141. See *Agster v. Maricopa Cty.*, 422 F.3d 836, 839 (9th Cir. 2005) ("The law of privilege is not frozen. The process of recognizing one is 'evolutionary.'" (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996))); *Peterson v. Chesapeake & Ohio Ry. Co.*, 112 F.R.D. 360, 363 (W.D. Mich. 1986) (noting that "the common law privileges doctrine is fluid rather than static, and should reflect at least in part . . . evolving considerations of public policy"); see also *supra* note 63 and accompanying text.

142. See generally *Babets v. Sec'y of Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1265 n.7 (Mass. 1988) ("In at least ten other states, common law jurisdiction in this area has been expressly sanctioned by statute or rule of court.").

143. *In re Application of United States*, 936 F. Supp. 357, 359 (E.D. La. 1996); cf. *Jenkins v. DeKalb Cty.*, 242 F.R.D. 652, 655 (N.D. Ga. 2007) ("[T]he absence of controlling precedent is not immediately and necessarily fatal to [an] assertion of privilege.").

144. See, e.g., *Marshall v. Anderson*, 459 So. 2d 384, 386 (Fla. Dist. Ct. App. 1984) ("[W]e are simply not empowered judicially to adopt any . . . privilege. Directly unlike the federal courts . . . the courts of Florida are statutorily forbidden to do so."); see also David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 906 n.112 (2009) ("Federal courts have undoubted authority to develop common law evidentiary privileges. In some states, courts are denied such authority except through the formal rule-making process for rules of evidence.") (citation omitted).

even state courts)¹⁴⁵ could adopt a friendship privilege as a matter of policy.¹⁴⁶

In fact, commentators have concluded that most proposed privileges satisfy the third prong of the Wigmore test.¹⁴⁷ A friendship privilege should be no exception,¹⁴⁸ as friendship has long been regarded as one of society's most significant and valued relationships.¹⁴⁹ Indeed, not only has friendship been a critical societal relationship in a historical sense,¹⁵⁰ but it seems likely to become even more important as the socializing influence of

145. See, e.g., *Citizens Commc'ns Co. v. Att'y Gen.*, 931 A.2d 503, 506 (Me. 2007) ("We can . . . create new privileges pursuant to our rulemaking powers . . ."); see also *Walstad v. State*, 818 P.2d 695, 697–98 (Alaska Ct. App. 1991) (noting that the psychotherapist-patient and clergy-communicant privileges are "creatures of the [Alaska Supreme Court's] procedural rulemaking authority").

146. See, e.g., *Commonwealth v. Chauvin*, 316 S.W.3d 279, 284 (Ky. 2010) ("Kentucky rules allow for the creation of statutory privileges."); *State v. Almonte*, 644 A.2d 295, 300 (R.I. 1994) (Lederberg, J., dissenting) ("[T]his court, by adopting the Rhode Island Rules of Evidence, has explicitly recognized the Legislature's authority to create . . . privileges."); see also *State v. Harris*, 755 P.2d 825, 828 (Wash. Ct. App. 1988) ("The creation of a testimonial privilege is a recognized function of legislative power.").

147. See, e.g., Deborah A. Ausburn, Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173, 180 (1985) ("The third requirement is that the state should encourage the relationship. If it were the only one, many human relationships would be protected. Most proposed privileges easily meet this requirement . . .") (footnote omitted); William Fullmer, Comment, *Protecting an Independent Accountant's Tax Accrual Workpapers from an Internal Revenue Service Summons*, 44 OHIO ST. L.J. 743, 763 (1983) (asserting that "Wigmore's third requirement is . . . quite easily satisfied").

148. See Kerr, *supra* note 40, at 4 ("[F]riendship is good for society, and so the law should work to facilitate the creation and continuity of friendships. We don't choose most of our family (or necessarily like them), but we hopefully like our friends. It makes sense to encourage things people like."); Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 659 (2011) ("[F]riendships contribute to people's emotional health and well-being In turn, emotionally healthy people have greater productivity and contribute more to society.").

149. See *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 851 (D. Md. 1973) ("As social animals, individuals necessarily place importance on friendships and relationships of trust. Hence the development of a right of privacy."), *aff'd*, 491 F.2d 498 (4th Cir. 1974); Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1183 n.165 (2009) (discussing "the elevated place of friendship in society's moral and symbolic imagination"); Melissa Bianca Kendall, *Friendship: The Forgotten Relationship in the Rehabilitation Environment*, 1 EDORIUM J. DISABILITY & REHABILITATION 12, 12 (2015) ("Friendship has been viewed as one of the most important of all relationships because friends help us understand the purpose of life.").

150. See generally Kerr, *supra* note 40, at 3 ("Friendship provides us a space for autonomy and control, where we can nurture nascent ideas and feelings."); Gelzinis, *supra* note 31, at 548 ("Friendship is a most-basic human relationship that allows us to live better lives, and it deserves careful consideration.").

the family declines¹⁵¹ and society itself continues to evolve.¹⁵² As one commentator observed:

Society has an interest in fostering and preserving friendships. Indeed, society should have an interest in ensuring that everyone has someone they can confide in That citizens have confidants, whether that person is a spouse, family member, friend, clergy member, psychotherapist, or, say, bartender, would appear to benefit us all.¹⁵³

E. *The Fourth Prong of the Test*

The fourth prong of the Wigmore test involves balancing the potential benefit the disclosure of confidential communications may have on the administration of justice against the harm such disclosure might have on the relationship that would be protected by the privilege under consideration.¹⁵⁴ Because this aspect of the test involves the weighing of competing interests that militate “both for and against disclosure,”¹⁵⁵ it

151. See Feinberg, *supra* note 148, at 658 (“[I]t is friends, not family members, upon whom people increasingly rely for emotional intimacy and guidance.”); MARILYN FRIEDMAN, WHAT ARE FRIENDS FOR? 187 (1993) (“In a time of widespread decline in the role of extended kinship networks and pitched battles over the role of sexual relationships in our lives, friendship may emerge, in our culture, as the least contested, most enduring, and most satisfying of all close personal affiliations.”); Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 717 (1996) (“Given the present high divorce rates, a . . . friend/friend relationship might indeed be more lasting and more stable than many marriages.”); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 212 (2007) (“[F]riendship increasingly serves many of the functions traditionally reserved for family . . .”).

152. See generally Feinberg, *supra* note 148, at 657 (“Scholars refer to friendship as ‘a relationship of increasing social significance in the contemporary world.’” (quoting Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, SOC. POL’Y & SOC’Y, Oct. 2004, at 409, 411)); Rosenbury, *supra* note 151, at 209 (“friendship is an increasingly important aspect of many people’s lives”).

153. I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 FORDHAM L. REV. 715, 726 (2012) (footnote omitted).

154. See *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983) (“Wigmore’s fourth condition recognizes the balancing which must be done when an asserted privilege contravenes a principle fundamental to the fair administration of justice—that the public has a right to everyone’s evidence.”); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970) (noting that Wigmore’s fourth condition involves “a balancing of interests between injury resulting from disclosure and the benefit gained in the correct disposal of litigation”).

155. *Hanson v. Rowe*, 500 P.2d 916, 919 (Ariz. Ct. App. 1972); cf. *SEC v. Touche Ross & Co.*, 438 F. Supp. 259, 263 (S.D.N.Y. 1977) (“[A] value judgment must be made as to whether creating a

presents the courts with the most analytical difficulty.¹⁵⁶ Not surprisingly, it is also the issue upon which courts contemplating the recognition of new privileges almost invariably focus.¹⁵⁷

1. A Friendship Privilege May Impede Truth-Seeking

The *McMillen* court concluded that this aspect of the test was not satisfied under the facts of that case,¹⁵⁸ noting that access to the plaintiff's private posts on Facebook "could help to prove either the truth or falsity" of his allegations.¹⁵⁹ Conversely, the court asserted that because a social media user generally "knows that even if he attempts to communicate privately, his posts may be shared with strangers as a result of his friends' selected privacy settings,"¹⁶⁰ there would be little or no detriment to social media friendships in allowing "other strangers, i.e., litigants, [to] become privy to those communications through discovery."¹⁶¹ In summary, the court struck the balance of interests contemplated under the Wigmore test in favor of disclosure in the social media context:

new privilege . . . would serve the public better than adherence to our basic premise that courts . . . are entitled to every man's evidence.").

156. See, e.g., *In re Agosto*, 553 F. Supp. 1298, 1309 (D. Nev. 1983) ("The fourth component of Wigmore's test presents a more difficult problem in analysis . . ."); cf. *In re Grand Jury Subpoena* (Psychological Treatment Records), 710 F. Supp. 999, 1010 (D.N.J.) ("This court recognizes that the balance it strikes depends heavily on its own normative predilections, especially given the absence of reliable empirical evidence on the subject.") (contemplating the recognition of a psychotherapist-patient privilege), *aff'd*, 879 F.2d 861 (3d Cir. 1989).

157. See Thomas J. Molony, Note, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of Jaffee v. Redmond*, 55 WASH. & LEE L. REV. 247, 260–61 (1998) (asserting that "in any privilege debate, the fourth condition [is] the [expected] battleground").

158. See *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285, at *11 (Pa. Ct. Com.Pl. Sept. 9, 2010) ("[W]hatever relational harm may be realized by social network computer site users is undoubtedly outweighed by the benefit of correctly disposing of litigation.").

159. *Id.* at *11–12.

160. *Id.* at *11; see, e.g., *Chaney v. Fayette Cty. Pub. Sch. Dist.*, 977 F. Supp. 2d 1308, 1313 (N.D. Ga. 2013) (describing an individual who "permitted access to her Facebook page using a semi-private setting that allowed her Facebook 'friends' and 'friends of friends' to view her page"); see also Xiaojing Li, Note, *Should Posts on Social Networking Websites be Considered "Printed Publications" Under Patent Law*, 2011 SYRACUSE SCI. & TECH. L. REP. 3, 27 ("[E]ven if users disclose information to a small number of close friends on these sites, the information may be disseminated to an unlimited group of people if just one 'friend' choose[s] a less private setting.").

161. *McMillen*, 2010 WL 4403285, at *11; cf. Daniel R. Fischel, *Lawyers & Confidentiality*, 65 U. CHI. L. REV. 1, 17 n.50 (1998) ("That close friends . . . can be compelled to disclose information . . . may deter initial communications, but the law presumes that the gains from disclosure by such confidants outweigh this effect.").

Millions of people join Facebook, MySpace, and other social network sites, and as various news accounts have attested, more than a few use those sites indiscreetly When they do and their indiscretions are pertinent to issues raised in a lawsuit in which they have been named, the search for truth should prevail to [bring] to light relevant information that may not otherwise have been known.¹⁶²

This reasoning is not entirely persuasive,¹⁶³ and in any event, has little or no application to traditional friendships.¹⁶⁴ The *McMillen* plaintiff's communications with his friends on social media certainly may have contained information relevant to his case.¹⁶⁵ To that extent, the court's recognition of a friendship privilege protecting those communications might well have "frustrate[d], to a degree, the discovery of truth and consequently the meting out of justice."¹⁶⁶

However, this possibility provides no basis for refusing to recognize a friendship privilege.¹⁶⁷ Evidence protected by any testimonial privilege is at least presumptively relevant,¹⁶⁸ as "the very nature of a privilege is that

162. *McMillen*, 2010 WL 4403285, at *12.

163. See Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. REV. BRIEF 1, 8 (2011) ("We tell our Facebook 'friends' secrets we once would have shared with only a few close friends"); cf. Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 WASH. U. L. Q. 961, 974 (2003) ("[T]he concept that once [a] confidence is disclosed the privilege has no remaining legitimate function to perform, is inconsistent with sound policy" (citing 1 CHARLES T. MCCORMICK, EVIDENCE § 93, at 372–73 (5th ed. 1999))).

164. See generally Kerr, *supra* note 40 at 3 ("Friends are our confidants, the keepers of our secrets in a more omnisciently public space—gossip with friends is our personal catharsis, a veritable *piece de resistance* against the saturation of Facebook and Tumblr.").

165. See, e.g., *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 116 (E.D.N.Y. 2013) ("[T]he relevance of a posting reflecting engagement in a physical activity that would not be feasible given the plaintiff's claimed physical injury is obvious"); see also *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401, 403 (D. Wyo. 2017) ("[I]t is conceivable that almost any post to social media will provide some relevant information concerning a person's physical and/or emotional health").

166. *Schoeman*, *supra* note 33, at 258; cf. *Int'l Union, UAW v. Honeywell, Inc.*, 300 F.R.D. 323, 328 n.3 (E.D. Mich. 2014) ("[T]he cost of any privilege is the possibility that cases will be decided on less than all of the relevant information known to the parties").

167. See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994) ("Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.").

168. See *In re Cty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008) ("[P]rivileged information may be in some sense *relevant* in any lawsuit."); *United States v. Zouras*, 497 F.2d 1115, 1119–20 (7th Cir. 1974)

it prevents disclosure of information that may be relevant in the case, in order to serve interests that are of over-arching importance.”¹⁶⁹ Indeed, the attorney-client and marital communications privileges both may impede the search for truth,¹⁷⁰ and yet that fact has not prevented the perpetuation of those two universally recognized privileges.¹⁷¹

In addition, individuals who share confidential information with friends assume some risk that those friends will betray their confidences,¹⁷² just as individuals who share information on social media risk the disclosure of that information to persons other than the intended recipients.¹⁷³ This

(“[E]vidence excluded by any privilege, is excluded not because the evidence is not relevant—by hypothesis it is—but because of independent policy justifications.”).

169. *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 530 (N.D. Ill. 1999); *see also* *United States v. Textron Inc.*, 577 F.3d 21, 31 (1st Cir. 2009) (stating “all privileges limit access to the truth in aid of other objectives” (citing *WIGMORE*, *supra* note 20 § 2291, at 527)); *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994) (“[R]elevance alone cannot be the test, because such a test would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances.”).

170. *See* *United States v. Lea*, 249 F.3d 632, 641 (7th Cir. 2001) (“One privilege that is firmly rooted in our common law is the marital communications privilege, which reflects the value our society places on uninhibited communications between spouses. . . . Yet, the cost of the privilege is a reduction in truthful disclosure.”); *United States v. Sabri*, 973 F. Supp. 134, 140 (W.D.N.Y. 1996) (noting “the attorney–client privilege, like all other evidentiary privileges, impinges on the production of relevant evidence, and thus functions as an obstacle to the fact-finder in the pursuit of truth”).

171. *See, e.g., State v. Clark*, 296 N.W.2d 372, 376 (Minn. 1980) (“The basic reason for enforcing the marital communications privilege is that the injury that would result to the marital relationship by disclosure of confidential communications outweighs the benefit conveyed by disclosure to the judicial investigation of truth.”); *see also* *Brunton v. Kruger*, 32 N.E.3d 567, 578 (Ill. 2015) (“The existence of a statutory privilege of any kind necessarily means that the legislature has determined that public policy trumps the truth-seeking function of litigation in certain circumstances.”).

172. *See, e.g., Pawloski v. State*, 380 N.E.2d 1230, 1233 (Ind. 1978) (discussing an individual who “felt compelled to come forward with information which might be of assistance to the police even though it acted to incriminate and betray the confidence of a friend”); *see also* *Taus v. Loftus*, 151 P.3d 1185, 1217–18 (Cal. 2007) (noting a person who shares confidential information with a relative or friend “assumes the risk . . . that the relative or friend may betray his or her confidence”); *State v. Reeves*, 427 So. 2d 403, 409 (La. 1982) (discussing “the known risk we all take that a false friend might betray our trust by revealing the contents of our conversation to others”); *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 770 (N.Y. 1970) (noting an individual “would necessarily assume the risk that a friend or acquaintance in whom he had confided might breach the confidence”); *State v. Woods*, 361 N.W.2d 620, 621 (S.D. 1985) (discussing “the risk that even a trusted friend will repeat or allow others to hear what you have said”).

173. *See* Monu Bedi, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*, 54 B.C. L. REV. 1, 62–63 (2013) (“Individuals on Facebook—like their offline counterparts—assume the risk that one or more of their Facebook friends may betray their trust and reveal their communication. . . . We must be wary before communicating confidential information to a Facebook friend in the same way we must be cautious before revealing information to another individual in a face-to-face interaction.”).

possibility may even have contributed to the prevailing view that such communications should be admissible in subsequent judicial proceedings.¹⁷⁴ Nevertheless, “we should not succumb to the assumption that, because we tell a friend who might betray our confidence, we cannot reasonably expect any privacy in the conversation.”¹⁷⁵ Indeed, a similar risk of betrayal inheres in the relationship between spouses¹⁷⁶ (and, for that matter, any other confidential relationship),¹⁷⁷ and yet the marital communications privilege and many other testimonial privileges have existed for generations,¹⁷⁸ and in some cases even longer.¹⁷⁹ The same

174. See *State v. Duarte*, 484 P.2d 1156, 1161 (Wash. Ct. App. 1971) (indicating “a conversation with a friend is admissible upon the theory of misplaced confidence”); cf. *Conquest v. Mitchell*, 618 F.2d 1053, 1057 (4th Cir. 1980) (Haynsworth, C.J., concurring) (stating an individual “is free to confide in a friend if he wishes [but] must suffer the consequences if the friend later betrays the confidence”).

175. *State v. Brooks*, 601 A.2d 963, 967 (Vt. 1991) (Morse, J., dissenting); see also *Taus*, 151 P.3d at 1218 (“[I]here is no reason to conclude that [a] person does not retain a reasonable expectation of privacy that may be violated when a third party . . . gains unauthorized and unwanted access to such [confidential] information from . . . [the person’s] relative or friend.”).

176. See Steven Goode & M. Michael Sharlot, *Article V: Privileges*, 30 HOUS. L. REV. 489, 544 (1993) (“[A] married person must recognize that no guarantee exists to ensure that his or her confidences will not, by inadvertence or malice, be divulged to any and all. Intimate marital communications . . . are inevitably at risk of disclosure to the other spouse’s relatives, workmates, and friends . . .”).

177. See *Ribas v. Clark*, 696 P.2d 637, 640 (Cal. 1985) (“[O]ne who imparts private information risks the betrayal of his confidence by the other party . . .”); *Warden v. Kahn*, 160 Cal. Rptr. 471, 476 (Ct. App. 1979) (noting “a person participating in what he reasonably believes to be a confidential communication bears the risk that the other party will betray his confidence”); Bedi, *supra* note 173, at 63 (asserting the risk of betrayal “is inherent in any relationship”); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1113 (1986) (“[W]hoever makes any information available to another person automatically and unavoidably assumes the risk of further disclosure. To share a confidence is to assume the risk of betrayal.”).

178. See, e.g., *State v. Holmes*, 412 S.E.2d 660, 661 (N.C. 1992) (“The common law has long recognized a privilege protecting confidential marital communications, that is, information privately disclosed between a husband and wife in the confidence of the marital relationship.”); see also *Keshecki v. St. Vincent’s Med. Ctr.*, 785 N.Y.S.2d 300, 302 (Sup. Ct. 2004) (“The physician–patient confidentiality privilege has been codified for over [175] years.”).

179. See, e.g., *O’Connor v. Johnson*, 287 N.W.2d 400, 402 (Minn. 1979) (“The attorney–client privilege, which was codified in Minnesota in 1851, . . . has been universally accepted since the 19th Century as indispensable to an attorney’s professional relationship with his client.”) see also *Alt v. Cline*, 589 N.W.2d 21, 33 (Wis. 1999) (Bradley, J., dissenting) (“The creation and modification of the ‘great’ privileges spans the course of centuries. . . . [T]he attorney–client privilege dates back almost to the time of Shakespeare when testimony at trial first came into practice. The ‘modern’ spousal privilege came into existence in the middle part of the nineteenth century.”) (citations omitted).

analysis should apply to the relationship between friends.¹⁸⁰

In short, the argument that the recognition of a friendship privilege would prevent the discovery and introduction of relevant evidence, and thus impede the judiciary's fundamental search for truth, is a relatively weak one.¹⁸¹ Professor Sanford Levinson, who is one of the few scholars to explore the merits of a friendship privilege,¹⁸² criticized the argument in the following terms:

All testimonial privileges block the State from compelling the disclosure of information that would presumably aid it in achieving knowledge of the truth about matters of public importance. Such failures of disclosure may also, of course, lead to injustice. Nonetheless, privileges are among the most important markers our society offers to adumbrate that there are more important values than truth and justice.¹⁸³

180. See Carly Brandenburg, Note, *The Newest Way to Screen Job Applicants: A Social Networker's Nightmare*, 60 FED. COMM. L.J. 597, 605 n.30 (2008) (“[W]hether the information one shares is with a doctor or lawyer (legally protected and private relationships) or with friends or acquaintances who are under no specific legal obligation to maintain the confidences shared with them is not determinative of whether the person can have an expectation of privacy.”).

181. See Raymond C. Ruppert, Note, *The Accountant-Client Privilege Under the New Federal Rules of Evidence—New Stature and New Problems*, 28 OKLA. L. REV. 637, 647–48 (1975) (“The . . . argument against [a] privilege—that privileges are an exception to the court’s right to know all the relevant facts— . . . can be made against all privilege laws. Yet privilege laws exist because the law recognizes that some communications must be made in the aura of confidentiality.”).

182. Unlike other academics such as Ethan Leib, Levinson has not focused his scholarship on the study of friendship. Cf. Kerr, *supra* note 40 at 4 (“Ethan Leib of Fordham is the representative—and most elegant—voice in law today for the reconstitution of ‘friendship law’ as part of the scholarly discourse.”); Agee, *supra* note 106 at 373 (describing Leib as “a leading scholar on friendship’s role in the law”). Levinson instead is “among our generation’s foremost constitutional scholars.” Richard H. Weisberg, *Levinson Is to Mr. Justice “Isaiah” as St. Paul Was to the Prophet Isaiah*, 38 PEPP. L. REV. 925, 935 (2011); see also Charles H. Hooker, Comment, *The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization*, 19 EMORY INT’L L. REV. 305, 316 n.45 (2005) (“Sanford Levinson is an internationally renowned scholar of constitutional law.”). In his article exploring the merits of a friendship privilege, which is discussed in more detail in Sections IV and VI, *infra*, Levinson did not purport to be expounding a “constitutional theory,” although he did acknowledge the “constitutional dimension of the protection of intimacy.” Levinson, *supra* note 29 at 636 & n.18.

183. Levinson, *supra* note 29 at 637; see also Int’l Union, UAW v. Honeywell, Inc., 300 F.R.D. 323, 328 n.3 (E.D. Mich. 2014) (“[T]ruth-seeking is not the *only* interest or principle at stake in litigation; if it was, there would be no need for any privileges, the very purpose of which is to protect against the disclosure of information notwithstanding its relevance.”); Jackson v. Dendy, 638 So. 2d 1182, 1186 (La. Ct. App. 1994) (“When privileges exist, miscarriages of justice will occur. But the relationship that is protected, on the whole, outweighs some of the individually incorrect results.” (quoting David V.

2. A Friendship Privilege Occasionally May Further the Search for Truth

Many individuals who are asked (or ordered)¹⁸⁴ to provide testimony against their friends presumably will be reluctant to do so¹⁸⁵ and may refuse to testify¹⁸⁶ despite the risk of being held in “contempt of court”¹⁸⁷ if they pursue that course of action.¹⁸⁸ There likewise is no guarantee that those who agree to testify will do so truthfully,¹⁸⁹ despite the risk of a perjury

Snyder, Comment, *Disclosure of Medical Information Under Louisiana and Federal Law*, 65 TUL. L. REV. 169, 201 (1990)).

184. See generally *United States v. Lockwood*, 386 F. Supp. 734, 738 (E.D.N.Y. 1974) (“[T]he absence of . . . privilege should not be construed as a prosecutorial imperative to place . . . friends in such a difficult and conscience-taxing position. The essence of justice includes not only an adherence to legal rules, but an element of compassion.”) (citation omitted).

185. See, e.g., *United States v. Jimenez*, 282 F.3d 597, 602 (8th Cir. 2002) (“Most witnesses called to testify before the grand jury about friends . . . likely are apprehensive about providing incriminating evidence against those they care about.”). But see *Carr v. United States*, 531 A.2d 1010, 1014 (D.C. Cir. 1987) (“Friends testify against other friends.”).

186. See, e.g., *Limone v. United States*, 497 F. Supp. 2d 143, 167 n.50 (D. Mass. 2007) (discussing a witness who “refused to testify against his friend”); *People v. Jones*, 714 N.W.2d 362, 365 (Mich. Ct. App.) (“Although numerous witnesses testified at trial, the only eyewitness was a friend of defendant’s . . . who refused to testify about defendant’s involvement in the shooting, stating that he did not want to incriminate defendant and their mutual friends.”), *leave to appeal denied*, 721 N.W.2d 215 (Mich. 2006); see also Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 440–41 (2011) (referring to the hypothetical friend “who places greater value on his friendship than the law by choosing not to testify against his friend”).

187. See *Fadjo v. Coon*, 633 F.2d 1172, 1174 n.2 (5th Cir. 1981) (noting absent a claim of privilege “a witness may be held in contempt of court for refusing to testify”). A finding of contempt “is a tool used by courts to compel compliance with their orders.” *Puchner v. Kruzicki*, 111 F.3d 541, 543 (7th Cir. 1997). In this context it typically involves the court-ordered incarceration of a witness who has refused to comply with an order to testify. See, e.g., *United States v. Nightingale*, 703 F.2d 17, 19 (1st Cir. 1983) (“[R]efusal to testify before a grand jury is usually remedied by a civil contempt order incarcerating the adamant witness for the life of the grand jury or until the testimony is forthcoming.”). The incarceration ends if the witness relents and agrees to testify. See *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1089 (9th Cir. 2014) (“Civil contempt is designed to coerce a witness’s testimony and confinement must end if the contemnor complies.”).

188. See *State v. Cherry*, 674 A.2d 589, 595 n.2 (N.J. Super. Ct. 1995) (describing a witness who “was held in contempt because he refused to testify against . . . his friend”); see also Schoeman, *supra* note 33, at 267 (“[P]ersons who feel conscious-bound not to reveal in court what a friend in confidence has related [could] plead conscientious refusal and hope that the presiding judge will show leniency when finding the witness in contempt.”).

189. See *Culbreath Isles Prop. Owners Ass’n v. Travelers Cas. & Sur. Co. of Am.*, 151 F. Supp. 3d 1282, 1287 n.29 (M.D. Fla. 2015) (discussing a witness’s testimony that was “colored by her loyalty and devotion to her life-long friend”), *aff’d sub nom.*, *Sidman v. Travelers Cas. & Sur.*, 841 F.3d 1197 (11th Cir. 2016); *State v. Deese*, 225 S.E.2d 175, 176 (S.C. 1976) (describing a witness who “testified

conviction for providing untruthful testimony.¹⁹⁰ As Professor Levinson explained, the “moral obligations of friendship” may cause a witness to “refuse to betray [a] secret, either by committing perjury or even by a willingness to go to jail for contempt of court.”¹⁹¹

Perjured testimony undermines the truth-seeking process¹⁹² “by creating a false picture of the evidence before the trier of fact.”¹⁹³ A witness’s refusal to testify, with or without the protection of a testimonial privilege,¹⁹⁴ may have the same effect.¹⁹⁵ For those reasons, any benefit to the administration of justice to be derived from refusing to recognize a

falsely under oath to protect a friend”); *see also* *United States v. Vecchiarello*, 569 F.2d 656, 659 (D.C. Cir. 1977) (noting “a witness . . . may desire to testify falsely to support a friend”).

190. *See* *People v. Martinez*, 377 N.E.2d 1222, 1226 (Ill. App. Ct. 1978) (describing a prosecution witness who “had given perjured testimony because of his friendship for defendant”); *see also* *Catz & Lange*, *supra* note 34 at 111 n.117 (“When a party’s best friend is called to the stand by the opposing party, problems are bound to arise. . . . The temptation to perjury is obvious.”). *See generally* *Catletti v. City of Orange*, 207 F. Supp. 2d 225, 229 (S.D.N.Y. 2002) (“A witness testifies under the risk of prosecution for perjury should he or she give false or misleading information.”), *aff’d sub nom.*, *Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003).

191. Levinson, *supra* note 29 at 659; *see also* Fischel, *supra* note 161 at 2 (“Friends . . . learn private information, frequently with the express or implied understanding that the information will be kept confidential. No doubt [they] also face the occasional dilemma of whether to maintain confidentiality or to disclose the information And regardless of what [they] would do voluntarily, they are subject to compelled disclosure by subpoena and face civil or criminal penalties if they refuse.”).

192. *See* *Price v. Time, Inc.*, 425 F.3d 1292, 1293 (11th Cir. 2005) (noting “the search for truth is led astray by perjury”); *SEC v. Payton*, 176 F. Supp. 3d 346, 354 (S.D.N.Y. 2016) (discussing “the perversion by possible perjury of a court proceeding’s truth-finding function”); *Jones v. Lincoln Elec. Co.*, 990 F. Supp. 1093, 1095 (N.D. Ind. 1997) (“Of course, an essential function of a trial is truth-finding, and false testimony can impede that function.”), *aff’d*, 188 F.3d 709 (7th Cir. 1999); *United States v. Pisani*, 590 F. Supp. 1326, 1342 (S.D.N.Y. 1984) (stating “perjury . . . impedes the truthseeking function of the tribunal”).

193. *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 954 P.2d 511, 516 (Cal. 1998); *see also* *Long v. Pfister*, 874 F.3d 544, 555 (7th Cir. 2017) (Hamilton, J., dissenting) (“A jury that hears evidence merely contradicting . . . perjury cannot be said to *know* the truth.”).

194. *See* *United States v. Bibbins*, 113 F. Supp. 2d 1194, 1202 (E.D. Tenn. 2000) (noting a party ordered to testify or produce evidence despite asserting a claim of privilege “may choose non-compliance over production”).

195. *See* *Howard v. United States*, 182 F.2d 908, 912 (8th Cir.) (noting witnesses can “obstruct or interfere with the administration of justice by refusing to testify, by testifying falsely, or by suppressing the truth”), *vacated as moot*, 340 U.S. 898 (1950); Covey, *supra* note 37 at 895 (“The witness can either testify truthfully, refuse to testify and risk being held in contempt, or lie under oath and commit perjury. The latter two alternatives directly interfere with the truth-seeking function of the court.”) (footnote omitted).

friendship privilege may be negligible.¹⁹⁶ As one commentator observed, “just as the assertion of [a] privilege impedes the search for truth, so too does perjury. . . . The difference is that the assertion of a privilege is a means of impeding the search for truth in a lawful manner, while perjury is an unlawful effort to the same end.”¹⁹⁷

In fact, by protecting “the friend in whom one has confided from possibly having to face the moral predicament of betraying a confidence, perjuring himself, [or] going to prison for contempt,”¹⁹⁸ the recognition of a friendship privilege actually might further the search for truth by eliminating his incentive to commit perjury.¹⁹⁹ This suggests that the balancing of

196. See *Allred v. Alaska*, 554 P.2d 411, 429 (Alaska 1976) (Dimond, J., concurring) (asserting “the truth-finding function of the courts would not be advanced by nonrecognition of [a] privilege” if compelling the witness to testify would not be “effective in breaching . . . existing confidentiality”); *Pratt v. Payne*, 794 N.E.2d 723, 725 (Ohio Ct. App.) (“[E]ven if witnesses are compelled to testify, they may still commit perjury or distort the truth”), *leave to appeal denied*, 798 N.E.2d 407 (Ohio 2003); Covey, *supra* note 37 at 896 n.142 (observing compelled testimony may be “so unreliable that the interests of adjudication are not furthered”).

197. Paul Rosenzweig, *Truth, Privileges, Perjury, and the Criminal Law*, 7 TEX. REV. L. & POL. 153, 165 (2002); cf. William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1942 (1993) (asserting testimonial privileges represent “a practical preference for silence over perjury”).

198. Schoeman, *supra* note 33, at 268; see *United States v. Antoon*, 933 F.2d 200, 204 (3d Cir. 1991) (describing an individual who “was, as the saying goes, between a rock and a hard place” because he “could refuse to cooperate with the authorities and risk going to jail himself, or he could betray his friend, help the government, and stay out of jail”). In other contexts, this “moral predicament” has been referred to as a “cruel trilemma.” *Butterfield v. State*, 992 S.W.2d 448, 451 (Tex. Crim. App. 1999) (citing *Brogan v. United States*, 522 U.S. 398, 404 (1990)); see *United States v. Mitchell*, No. 08-CR-46-LRR, 2009 WL 103610, at 3 (N.D. Iowa Jan. 15, 2009) (“The adverse spousal testimony privilege shields the witness-spouse from ‘the ‘cruel trilemma’ of perjury, contempt, or betrayal of the [defendant-spouse.]” (quoting GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.4, at 450 n.15 (3d ed. 1996))) (bracketing omitted); Libson, *supra* note 131 at 166 (“[W]hen parents are subpoenaed to testify against their children, they face what has been referred to as the ‘cruel trilemma,’ where parents face three options: (1) betray their children by testifying truthfully; (2) refuse to testify and be held in contempt of court, facing possible imprisonment; or (3) testify falsely, committing perjury.”).

199. Cf. *State v. Wood*, 758 P.2d 530, 532 (Wash. Ct. App. 1988) (“The marital privileges . . . were designed to avoid forcing the witness spouse to choose between perjury, contempt of court, or jeopardizing the marriage.”). See generally *Rancho Publ'ns v. Superior Court*, 81 Cal. Rptr. 2d 274, 280 n.6 (Ct. App. 1999) (“[P]rivileges may promote truth seeking by avoiding conflicts of interest that could lead to perjury.” (citing David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 114–15 (1956))); Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 614 (1987) (suggesting “privileges actually aid the ascertainment of truth by eliminating those situations in which perjured testimony is more likely”).

interests required by the fourth prong of the Wigmore test may favor recognition of the privilege.²⁰⁰ As one court observed:

[I]f a . . . privilege is foreclosed, the truth may yet remain elusive and even just as unobtainable, in light of the perjury which could take place if such testimony is coerced. [¶] In explaining Wigmore's fourth criterion for the recognition of a testimonial privilege, then, the expected benefit to justice, used as a rationale for a bar of the privilege, is perhaps illusory.²⁰¹

V. SOME SCHOLARS SUPPORT THE RECOGNITION OF A FRIENDSHIP PRIVILEGE

In one of the few scholarly articles considering the merits of a friendship privilege,²⁰² Professor Ferdinand Schoeman concluded that the protection enjoyed by spouses under the marital communications privilege should extend by analogy to "intimate friendship between persons not married to one another."²⁰³ While acknowledging that Wigmore himself might have opposed any such extension of the marital communications privilege,²⁰⁴ Schoeman maintained that it is nevertheless possible to use Wigmore's criteria "as the basis for such an extension."²⁰⁵

200. See Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN'S L.J. 1, 42 (1999) ("If silence should be immunized whenever witnesses are under great pressure to commit perjury, then friends . . . should . . . be exempted from the obligation to testify against each other.").

201. *In re Agosto*, 553 F. Supp. 1298, 1310 (D. Nev. 1983) (recognizing a parent-child privilege). *But see State v. Maxon*, 756 P.2d 1297, 1303 (Wash. 1988) (en banc) ("[B]asing recognition of an evidentiary privilege on the refusal of some witnesses to testify or on a fear of perjury is . . . unsound" precisely because doing so "would necessitate granting privileges to . . . distant relatives and even to friends . . .").

202. See Schoeman, *supra* note 33, at 269 ("Legal recognition of a communication privilege between friends seems to me to have the potential consequence of enhancing public recognition of the value of friendship. Friendship would then become a recognizable relationship within public morality and public consciousness.").

203. *Id.* at 268; see also *Developments in the Law, supra* note 43, at 1590 (asserting the marital privilege "should extend beyond legally recognized marriages to . . . the parent-child and other familial relationships, as well as relationships between . . . friends").

204. See Schoeman, *supra* note 33, at 262 ("Wigmore would have rejected proposals to broaden the scope of the privilege of confidential communication . . ."); cf. *United States v. Jaskiewicz*, 278 F. Supp. 525, 530 (E.D. Pa. 1968) (noting "Professor Wigmore . . . cautioned against the expansion of privileges").

205. Schoeman, *supra* note 33, at 262.

Schoeman is not alone in suggesting that a friendship privilege would satisfy the Wigmore test.²⁰⁶ One student commentator made the point in the following terms:

[P]ersonal friendship . . . would, to some degree, seem to meet the four Wigmore criteria. These communications originate in confidence essential to the satisfactory maintenance of the relationship. These relationships are favored by most groups within the society and would be irreparably damaged by disclosure. If taken seriously, therefore, Wigmore's criteria would invite [recognition] of the privilege.²⁰⁷

In refusing to recognize a friendship privilege in the social media context,²⁰⁸ the court in *McMillen v. Hummingbird Speedway, Inc.*²⁰⁹ not only ignored (or at least overlooked)²¹⁰ the analysis in these articles²¹¹ but another thoughtful article in which Professor Sanford Levinson argued that the Wigmore test is not even the appropriate formulation for determining whether a friendship privilege should be recognized.²¹² Levinson, who

206. See Covey, *supra* note 37 at 881 n.20 (“[S]ome argue that relationships between close friends . . . might . . . qualify for privilege status under the Wigmore test.”); *Functional Overlap*, *supra* note 86, at 1230 (asserting “relationships ranging from personal friendship to psychiatrist and patient . . . seem to meet the four Wigmore criteria”).

207. *Functional Overlap*, *supra* note 86, at 1230.

208. See *Hoy v. Holmes*, 28 Pa. D. & C. 5th 9, 13 (Ct. C.P. 2013) (citing *McMillen* for the proposition that there is “no privilege between friends on [a] social media account”).

209. *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285, (Pa. Ct. Com.Pl. Sept. 9, 2010).

210. The courts’ authority to recognize and develop new common law privileges encompasses the authority “to consult treatises and commentaries on the law of evidence.” *In re Grand Jury Investigation*, 918 F.2d 374, 379 (3d Cir. 1990); see also *In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (suggesting courts consider “scholarly opinion . . . in considering [a] claim of . . . privilege”).

211. See, e.g., Schoeman, *supra* note 33, at 265 (“Friendship, though not presently recognized as entailing a legal relationship, surely does capture many of the social and moral aspects, the inner sharings, that marriage is presumed to have. In fact, by definition these qualities are present in intimate friendships.”); cf. Gelzinis *supra* note 31, at 547 (“Why are judges and policymakers so preoccupied with the institution of marriage, when the same kinds of personal and communal benefits can flow from friendship, which has been ignored by the law?”).

212. See Levinson, *supra* note 29 at 642–43 (asserting the Wigmore test “is not a conception that takes right seriously,” and applauding the fact that “recent scholarly analysis of testimonial privileges [instead] has emphasized the notion of ‘privacy’”); cf. Kerry L. Morse, Note, *A Uniform Testimonial Privilege for Mental Health Professionals*, 51 OHIO ST. L.J. 741, 744 (1990) (noting scholars who deem the protection of individual privacy to be a more compelling rationale for the existence of testimonial privileges maintain “certain communications should be protected by a privilege, without considering any greater benefit to society”). See generally *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038,

characterized friendship as a value “eminently worth protecting,”²¹³ objected to the Wigmore test primarily because its application enables individuals to enjoy “only those privileges that the society itself deems desirable in order to attain broad social goals,”²¹⁴ and thus occasionally may force them “to choose between the demands of friendship and those of the wider society.”²¹⁵

Levinson concluded that the deficiencies in the Wigmore test,²¹⁶ which some jurists have also noted,²¹⁷ has resulted in an unfortunate “capitulation

1055 (E.D.N.Y. 1976) (discussing the “increasing pressures for the creation of entirely new privileges . . . predicated upon expanding concepts of privacy”), *aff’d*, 556 F.2d 556 (2d Cir. 1977).

213. Levinson, *supra* note 29 at 641. Levinson has stated elsewhere that his own life has been “immeasurably aided by friendships.” Sanford Levinson, *Some Reflections on Multiculturalism, “Equal Concern and Respect,” and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 994 (1993).

214. Levinson, *supra* note 29 at 643. Schoeman also implicitly criticized the Wigmore test. *See* Schoeman, *supra* note 33, at 263 (“The integrity of [intimate] relationships presupposes people’s recognition of the legitimacy of relationships whose value is *independent of the values of others or of the values of the culture generally*. Relationships between people must exist for the sake of one another.”) (emphasis added). Schoeman proceeded to explain his view of the issue in the following terms:

It seems to me to be a mistake of the first order to think that the extent to which we should give social and legal recognition to an institution is determined purely on the basis of the social contributions of that institution. We must be especially sensitive to the meaning that institutions have for individuals in reckoning the extent to which they deserve special status For the same reasons—because of the significance to intimate selves—friendship relationships deserve social recognition and legal protection.

Schoeman, *supra* note 33, at 266–67.

215. Levinson, *supra* note 29 at 636; *cf.* Susan W. Brenner & Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & POL’Y 211, 267 (2006) (“[M]any . . . disclosures take place in the course of defined relationships, such as wife/husband, patient/doctor, client/attorney, and penitent/priest, where society’s interest in maintaining the full flow of information justifies . . . an evidentiary privilege. We also can identify other relationships that have enough societal significance . . . to justify protecting the disclosing party’s interest in the confidentiality of information even if society does not recognize that the information should be privileged from disclosure in court proceedings.”).

216. *See generally* Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZA L. REV. 1569, 1584–85 (1997) (“Wigmore’s four-part test has been criticized for being ambiguous and for failing to explain accurately the reasons for communication privileges. Many writers now recognize that this simple utilitarian test cannot, and should not, be the sole means for determining the relationships to which the communication privilege should apply.”) (footnote omitted).

217. In *Allred v. State*, for example, Alaska Supreme Court Justice Pro Tem. John Dimond asserted that the “need for a privilege should not depend upon community approval of the relationship” at issue. *Allred v. State*, 554 P.2d 411, 428 (Alaska 1976) (Dimond, J., concurring). Dimond maintained that it instead is “the purpose of the relationship and its legitimate value *to the participants* which should be weighed against the truth-finding function of the courts.” *Id.* at 429

to professionalism,”²¹⁸ in that “the only persons, other than one’s spouse, with whom it is ‘safe’ to speak about intimate matters, are those with professional credentials.”²¹⁹ Stated more colloquially, “the State . . . has declared, through assignment of testimonial privileges, that relationships with a legal spouse or certified psychiatrist are ‘more valuable’ than those with a . . . compassionate friend.”²²⁰

Levinson is not alone in lamenting this phenomenon.²²¹ Contrasting the absence of a friendship privilege with the existence of an accountant-client privilege in several states,²²² another commentator made the following observation:

(emphasis added); see also Molony, *supra* note 157, at 259–60 (“Courts traditionally have based their privilege decisions on the status of the communicators, rather than focusing, as Wigmore did, on the type of communication involved and the societal importance of the relationship between the parties.”).

218. Levinson, *supra* note 29 at 647; see also Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 91 (2008) (“[M]any privileges—including the psychotherapist-patient privilege—came about by intensive lobbying efforts by professionals seeking special status for their communications.”).

219. Levinson, *supra* note 29 at 647. Elizabeth G. Thornburg explains:

Examining privileges as a group, one could easily conclude that the law is not primarily concerned with personal values and intimate relationships. Communications between parents and children, brothers and sisters, lovers, and friends are not protected by a testimonial privilege. Instead, the law favors various professionals, . . . and gives privileges to communications with professionals much more readily than to communications with intimates”

Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 190 (1993) (footnote omitted).

220. Levinson, *supra* note 29 at 657.

221. See, e.g., Marianne E. Scott, Comment, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901, 902 (1983) (“Despite the expansion of professional testimonial privileges, nonprofessional privileges have not enjoyed a similar growth in testimonial privileges. The only communication privilege that does not involve a professional is the privilege protecting marital communications.”). This phenomenon is occasionally associated with what has become known as the “power” theory of testimonial privileges, which holds that “whatever citizens or professional organizations command the most power and social prestige are likely to have their communications privileged by legislators or the judiciary.” R. Michael Cassidy, *Reconsidering Spousal Privileges After Crawford*, 33 AM. J. CRIM. L. 339, 358 n.144 (2006); see also Charles Nesson, *Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471, 1494 (1985) (“The vast majority of new privileges have been created by statute, a process that certainly requires the exercise of political power.”).

222. The common law did not recognize an accountant-client privilege, and there continues to be no such privilege under federal law. See *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1040 (D. Nev. 2006) (citing *Couch v. United States*, 409 U.S. 322, 335 (1973)). Nevertheless, “to date at least sixteen states and the Commonwealth of Puerto Rico have enacted accountant/client privilege statutes.” *In re A Special Investigation No. 202*, 452 A.2d 458, 460 (Md. Ct. Spec. App. 1982); see also Christopher D. Jones, Recent Development, *Jaffee v. Redmond: The Supreme Court Adopts a*

The unspoken message is that the communications between friends are not as important as are those between, for example, an accountant and a client. While a free and open exchange of information and opinions between accountant and client is apparently vital, a free and open exchange of information and opinions between friends apparently is less so.²²³

VI. THE POTENTIAL IMPACT OF *JAFFEE V. REDMOND*

Nascent as it may be,²²⁴ the argument for recognizing a friendship privilege was bolstered by the Supreme Court's recognition of a federal common law psychotherapist-patient privilege in *Jaffee v. Redmond*.²²⁵ Invoking Rule 501 of the Federal Rules of Evidence,²²⁶ the *Jaffee* Court effectively held (and several lower federal courts had previously concluded)²²⁷ that this privilege satisfies Wigmore's four-part test for the recognition of new testimonial privileges.²²⁸

Testimonial Privilege for Psychotherapists and Extends the Privilege to Licensed Social Workers, 23 J. CONTEMP. L. 252, 266 (1997) (asserting "an accountant-client privilege, which is already recognized in several states, may . . . eventually be recognized in most or all of the fifty states"). For a discussion of the prospects for a federal version of the accountant-client privilege, see Molony, *supra* note 157.

223. Kaufman, *supra* note 35 at 655.

224. See generally *Nilavar v. Mercy Health Sys.*, 210 F.R.D. 597, 606 (S.D. Ohio 2002) ("[T]here must always be . . . that court which takes the first step into an area left to common law development . . .").

225. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

226. See *id.* at 8 ("Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" (quoting FED. R. EVID. 501)). For a brief discussion of the rule's operation, see *supra* notes 5853–64 and accompanying text.

227. See *In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1012 n.13 (D.N.J.) ("Wigmore cites four requirements necessary to establish a privilege, all of which are met in the context of the psychotherapist-patient relationship."), *aff'd*, 879 F.2d 857 (3d Cir. 1989); *United States v. Friedman*, 636 F. Supp. 462, 462 (S.D.N.Y. 1986) ("[T]he four conditions advanced by Professor Wigmore as necessary to the establishment of a privilege could obtain in a true psychotherapist-patient relationship." (citing *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983))).

228. See Jennifer Sawyer Klein, Note, "*I'm Your Therapist, You Can Tell Me Anything*": *The Supreme Court Confirms the Psychotherapist-Patient Privilege in Jaffee v. Redmond*, 47 DEPAUL L. REV. 701, 731 (1998) ("The psychotherapist patient-privilege, as defined in *Jaffee*, meets the conditions of the four-part Wigmore test. Although the majority did not directly cite to this test in its opinion, much of the reasoning seems to derive from the basic principles of the test.") (footnote omitted); cf. Mary Kearny Stroube, Comment, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 PAC. L.J. 801, 819 (1979) ("These four criteria have been applied to the psychotherapist-patient relationship by a number of commentators, all of whom agree that the psychotherapeutic relationship . . . meets these standards.") (footnote omitted).

Significantly, the *Jaffee* Court defined this “newly-recognized privilege”²²⁹ broadly enough to encompass an individual’s confidential therapeutic communications with a licensed social worker.²³⁰ The Court explained this aspect of its decision in functional terms:

The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals.²³¹

The significance of the *Jaffee* Court’s reasoning for the recognition of a friendship privilege stems from the therapeutic role friendship often plays in people’s lives.²³² Justice Antonin Scalia referred to this role in a

229. See *United States v. Hardy*, 640 F. Supp. 2d 75, 79 (D. Me. 2009) (characterizing the *Jaffee* privilege); see also *Jaffee v. Redmond*, 518 U.S. at 20 (Scalia, J., dissenting) (asserting the Court was “creating a privilege that [was] new, vast, and ill-defined”). Prior to the Supreme Court’s decision in *Jaffee* there actually was a “split in the circuits over recognition of a psychotherapist/client privilege.” *United States v. Glass*, 133 F.3d 1356, 1359 (10th Cir. 1998). However, “[e]ven those circuits that did recognize a psychotherapist-privilege prior to *Jaffee* limited its application to psychiatrists and psychologists.” Merrily S. Archer, Recent Development, *All Aboard the Bandwagon!: The Uncertain Scope of the Federal Psychotherapist-Client Privilege in the Aftermath of Jaffee v. Redmond*, 52 WASH. U. J. URB. & CONTEMP. L. 355, 372 n.84 (1997) (citing cases).

230. See *Jaffee v. Redmond*, 518 U.S. at 15 (showing the origins of the social worker-client privilege in relation to a psychotherapist-patient privilege). Like the psychotherapist-patient privilege from which it is derived, *In re Grand Jury Subpoena* (Psychological Treatment Records), 710 F. Supp. at 1001, the social worker-client privilege “was unknown at common law.” *People v. Bass*, 529 N.Y.S.2d 961, 962 (Sup. Ct. 1988).

231. *Jaffee v. Redmond*, 518 U.S. at 15–16 (footnote and citations omitted). For a prior academic discussion of this aspect of *Jaffee*, see Melanie Stephens Stone, Case Note, *Jaffee v. Redmond: The Supreme Court Adopts a Federal Psychotherapist-Patient Privilege and Extends the Scope to Encompass Licensed Social Workers*, 48 MERCER L. REV. 1283 (1997).

232. See *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 302 (Mass. 2008) (describing two friends who “confided in each other as they weathered turmoil in their personal lives”); *People v. Fentress*, 425 N.Y.S.2d 485, 492 (Dutchess Cty. Ct. 1980) (describing an individual who “was in effect called upon to serve as psychologist, therapist, counselor, and friend”); see also *Office of Disciplinary Counsel v. Simon*, 507 A.2d 1215, 1221 (Pa. 1986) (observing that there are many different ways to manage the “pressures [that] come to bear on us during our daily lives,” including “individual psychotherapy, group therapy, and reliance upon family and friends”); Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 731 (2016) (referring to a possible “functional equivalence between psychotherapists’ advice, on the one hand, and the advice of friends and family members, on the other”). For a scholarly discussion of one variation of the therapeutic role of friends, see Sherwin Davidson & Ted Packard, *The Therapeutic Value of Friendship Between Women*, 5 PSYCHOL. OF WOMEN Q., 495(1981).

dissenting opinion in which he asserted that in order to fulfill its purpose,²³³ the privilege the *Jaffee* Court was recognizing would need to encompass confidential therapeutic communications with an even broader class of “psychotherapists”²³⁴ than the majority identified.²³⁵ With characteristic rhetorical flourish,²³⁶ Justice Scalia observed:

When is it, one must wonder, that the *psychotherapist* came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, *best friends*, and bartenders—none of whom was awarded a privilege against testifying in court.²³⁷

Justice Scalia’s reasoning has since been invoked in support of the emerging parent-child privilege,²³⁸ which—contrary to his

233. See *Jaffee v. Redmond*, 518 U.S. at 18 (Scalia, J., dissenting) (“The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling.”).

234. See generally *Wei v. Bodner*, 127 F.R.D. 91, 97 (D.N.J. 1989) (“Psychotherapist is a broad, imprecise term that can encompass psychiatrists, psychologists, social workers, clergy and others.”).

235. See *United States v. Robinson*, 5 F. Supp. 3d 933, 939 (S.D. Ohio 2014) (“Justice Scalia would have the privilege be ‘categorical enough to achieve its announced policy objective.’” (quoting *Jaffee v. Redmond*, 518 U.S. 1, 19 (Scalia, J., dissenting))); Stern, *supra* note 119, at 632 (“Justice Scalia . . . highlighted the irony of failing to protect the relationships that traditionally benefit from open communication.”); cf. Christopher B. Mueller, *The Federal Psychotherapist-Patient Privilege After Jaffee: Trust and Other Values in a Therapeutic Age*, 49 HASTINGS L.J. 945, 955 (1998) (“the privilege approved in *Jaffee* is arguably flawed because it is too narrow”).

236. See Michael Stokes Paulsen & Steffen N. Johnson, *Scalia’s Sermonette*, 72 NOTRE DAME L. REV. 863, 863 (1997) (“Justice Antonin Scalia’s flamboyant judicial rhetoric and colorful writing style more than occasionally make headlines. Seemingly alone among the justices, Scalia is the master of the eminently quotable turn-of-phrase, the arresting quip, the provocatively expressed legal argument.”).

237. *Jaffee v. Redmond*, 518 U.S. at 22 (Scalia, J., dissenting); see also RICHARD RESTAK, *THE NEW BRAIN: HOW THE MODERN AGE IS REWIRING YOUR MIND* 121 (2003) (“For centuries the principle treatment for depression was talking to friends. . . . Later, thanks to Sigmund Freud and others, the treatment of depression came within the province of psychiatrists who formalized ‘talk’ treatment into various kinds of psychotherapy.”).

238. See, e.g., Hillary B. Farber, *Do You Swear to Tell the Truth, The Whole Truth, and Nothing But the Truth Against Your Child*, 43 LOY. L.A. L. REV. 551, 571–72 (2010) (“In *Jaffee*, Justice Antonin Scalia asked an empirical question . . . concerning the benefits of seeking advice from one’s mother Justice Scalia’s remark underscores the necessity of parent-child communication, particularly as it applies to minors.” (discussing *Jaffee v. Redmond*, 518 U.S. 1, 22 (Scalia, J., dissenting))); cf. Maureen P. O’Sullivan, *An Examination of the State and Federal Courts’ Treatment of the Parent-Child Privilege*, 39 CATH. LAW. 201, 221 (1999) (“Since *Jaffee*, it appears that federal courts are not as adamant as they once were against recognizing the parent-child privilege.”); Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. POL’Y REV. 85, 90 (2003) (“Support for development of a parent-child privilege is found in the Supreme Court’s 1996 decision in *Jaffee v.*

intimation²³⁹—already exists in some jurisdictions precisely in order “to permit and encourage children to confide in their parents and seek their advice in times of trouble.”²⁴⁰ Recognition of this privilege also reflects the fact that “the poor and those of modest means”²⁴¹ will often turn to their parents (and occasionally their children)²⁴² rather than to paid professionals for therapeutic guidance.²⁴³ There is no principled reason for the law of testimonial privilege to discourage this choice.²⁴⁴ Indeed, it is both illogical and inequitable to require individuals to “seek a professional psychotherapist’s assistance, rather than parental assistance, in order for [their] communications to remain privileged.”²⁴⁵

Redmond”). For a discussion of *Jaffee*’s potential impact on the parent-child privilege, see Ricafort, *supra* note 15.

239. See Carolyn Peddy Courville, Comment, *Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 HOUS. L. REV. 187, 217 (1998) (“[C]ontrary to Justice Scalia’s sarcastic comment, a parent-child privilege has been recognized by more than one court and several legislatures.”) (footnote omitted).

240. *State v. Stevens*, 580 N.W.2d 75, 79 (Minn. Ct. App. 1998) (interpreting MINN. STAT. § 595.02, subd. 1(j)); see also *Cabello v. Mississippi*, 471 So. 2d 332, 340 (Miss. 1985) (noting that the parent-child privilege is “directed to the confidences a son or daughter might reveal to a parent in expectation of guidance through counseling or moral support”); Franklin, *supra* note 67, at 174 (asserting that “the primary purpose of the parent-child privilege is to encourage children to confide in their parents”).

241. *Jaffee v. Redmond*, 518 U.S. 1, 16 (1996).

242. See generally *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1206 (Mass. 1983) (“[A] parent does not need the advice of a minor child in the same sense that a child may need the advice of a parent”); *North Pac. Ins. Co. v. Stucky*, 338 P.3d 56, 65 (Mont. 2014) (noting “an adult child’s reliance on a parent for guidance and support is likely different from the parent’s reliance on a child”); Covey, *supra* note 37, at 904 (“[C]hildren go to their parents seeking advice and guidance more often than parents go to their children.”).

243. See Perry, *supra* note 38, at 107 (“When a child is faced with a problem, the child (whether an adult or a minor) instinctively turns to his or her parents for guidance and advice. Indeed, it seems likely that adult children rely on their parents before resorting to paying a professional for assistance.”); cf. Stern, *supra* note 119, at 623–24 (“For parents and children who . . . cannot afford a psychotherapist . . . the family provides one of the only available zones of safety for them to voice concerns before they grow beyond their control.”).

244. See Perry, *supra* note 38, at 107 (“[L]ogic suggests the communications between parent and child should be protected perhaps even before professional disclosures.”).

245. Yolanda L. Ayala & Thomas C. Martyn, Note, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter’s Privileges*, 9 ST. JOHN’S J. LEGAL COMMENT. 163, 179 (1993); see also Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and a Proposal*, 16 FAM. L.Q. 1, 13 (1982) (“It is anomalous that the child’s relationship with his natural ally and traditional source of guidance and protection has not been accorded the same protection from compelled disclosure as has the professional relationship.”).

However, as Justice Scalia seemed to recognize,²⁴⁶ many troubled individuals may be at least as likely to seek therapeutic guidance from their friends as from their parents,²⁴⁷ and some people may rely exclusively on their friends for advice and support in times of trouble.²⁴⁸ Indeed, while some scholars have questioned the therapeutic value of friendship,²⁴⁹ others insist that therapeutic communications will:

play a larger and larger role in friendship in our own day—a day that has seen . . . the triumph of the therapeutic, in which a friend, as like as not several friends, serve one another as surrogate psychotherapists, to whom to recount disappointments, secrets, troubles little and large, so that the word “intimacy,” so long associated with friendship, has also become nearly synonymous with “confessional.”²⁵⁰

246. See *Jaffee v. Redmond*, 518 U.S. at 22 (Scalia, J., dissenting) (highlighting the recognition of troubled individuals seeking advice); see also RICHARD RESTAK, *THE NEW BRAIN: HOW THE MODERN AGE IS REWIRING YOUR MIND* 121 (2003) (reviewing the support of Justice Scalia to troubled individuals).

247. See *People v. Hilligas*, 670 N.Y.S.2d 744, 747 (Sup. Ct. 1998) (“[An] adult . . . is more likely to seek advice and guidance from persons other than their parents. These people may be . . . close friends . . .”); *Eisel v. Bd. of Educ.*, 597 A.2d 447, 453 (Md. 1990) (“An adolescent who is thinking of suicide is more likely to share these feelings with a friend than with a . . . parent . . .” (quoting *Monthly Memo*, MARYLAND OFFICE FOR CHILDREN AND YOUTH, Apr., 1986, at 3 Memorandum from the Maryland Office for Children and Youth, at 3 (Apr. 1986))); *State v. Maxon*, 756 P.2d 1297, 1301–02 (Wash. 1988) (observing that “children often seem more reluctant to discuss private matters with their parents than with . . . friends, especially when those matters concern misdeeds of the child”).

248. See Feinberg, *supra* note 148, at 659 (“Many people rely exclusively upon friends for assistance in times of serious emotional distress.”); cf. Davidson & Packard, *supra* note 232, at 496 (“A friend is frequently the person to whom individuals first turn for help with problems.”) (citations omitted).

249.

If the problems facing mental health patients could be discussed with their friends or mothers, they no doubt would be. It is precisely because some problems are so personal and potentially embarrassing that people seek out unknown and unrelated therapists with whom to discuss the problems. It seems very unlikely that one would discuss sexual dysfunction, childhood abuse, or intimate marital problems with friends, and it seems even less likely one would discuss such things with one’s mother.

Courville, *supra* note 239, at 217.

250. JOSEPH EPSTEIN, *FRIENDSHIP: AN EXPOSÉ* 61 (2006); cf. *Sioux Assocs., Inc. v. Iowa Liquor Control Comm’n*, 132 N.W.2d 421, 426 (Iowa 1965) (noting that the term “confidant” is a synonym for the word “friend”); see generally Davidson & Packard, *supra* note 232, at 496 (suggesting that “friendship has therapeutic value and can serve as a substitute for therapy”).

This would seem to make friendship—like the parent-child relationship²⁵¹—a logical candidate for the protection of a testimonial privilege.²⁵² Discussing the implications of Justice Scalia's opinion in *Jaffee*,²⁵³ one prominent scholar in the interdisciplinary field of law and psychotherapy,²⁵⁴ Professor Daniel Shuman,²⁵⁵ posed the following rhetorical questions: "Why should we regard governmental intrusion on parent-child relationships . . . as any less pernicious than intrusion on psychotherapist-patient relationships? What of governmental intrusion on confidential communications between siblings or close friends?"²⁵⁶

Professor Shuman's inquiry is apt.²⁵⁷ It is not at all clear why the law should operate to discourage emotionally troubled individuals (or anyone

251. See Watts, *supra* note 199 at 609 ("Its similarities to the psychotherapist-patient relationship . . . make the parent-child relationship a perfect candidate for a privilege."); cf. *Belmer v. Virginia*, 553 S.E.2d 123, 131 (Va. Ct. App. 2001) (Elder, J., dissenting) ("Numerous . . . legal principles acknowledge the importance of the role of a parent as a confidante and counselor to his minor child.").

252. See *People v. Wood*, 505 N.W.2d 882, 885 (Mich. Ct. App. 1993) ("Privileges are intended to encourage society's interest in open discussion between persons in need and those from whom they seek help."); *vacated and remanded on other grounds*, 523 N.W.2d 477 (Mich. 1994); Gelzinis, *supra* note 31, at 548 ("While the law does much for family members, extending certain legal measures to include friends would be a realistic acknowledgment that in times of difficulty, we often depend on the selfless acts of friends as well as family.").

253. See Daniel W. Shuman, *Legal Boundaries on Conceptions of Privacy: Seeking Therapeutic Accord*, in CONFIDENTIALITY: ETHICAL PERSPECTIVES AND CLINICAL DILEMMAS 266, 274 (Charles Levin et al. eds. 2003) (quoting *Jaffee v. Redmond*, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting)).

254. See generally Louis Everstine, *Law and Psychotherapy: The State of the Relationship*, in PSYCHOTHERAPY AND THE LAW 3, 23 (Louis Everstine & Diana Sullivan Everstine eds. 1986) ("In spite of the many differences of interpretation and emphasis and profound variance in values and goals, law and psychotherapy remain purposefully intertwined. The importance of one discipline to the other will reaffirm itself as their relationship improves with understanding.").

255. Professor Shuman has been described as a "well-respected scholar in the area of law and psychiatry." John B. Attanasio, *In Memoriam: Professor Daniel W. Shuman*, 64 SMU L. REV. 1189, 1189 (2011); see also Liza H. Gold & Robert I. Simon, *Daniel W. Shuman: A Gift for Collaboration*, 64 SMU L. REV. 1197, 1199 (2011) (describing Professor Shuman as "one of the preeminent scholars in the field of mental health and the law").

256. Shuman, *supra* note 253, at 274; cf. Fischel, *supra* note 161, at 3 ("[W]hy should communications with attorneys be 'encouraged' more than communications with close friends . . . or relatives? I suspect that outside the legal profession, many believe these other communications need to be encouraged more than interactions with lawyers.").

257. See Scott, *supra* note 221, at 920 ("An anomaly . . . exists in the current law on testimonial privileges. It is difficult to rationalize why a professional relationship . . . that may last only one hour is afforded more legal protection than the vital parent-child relationship that endures for the lifetime of both parties."); cf. *Beam ex rel. Martha Stewart Living Omnimedia, Inc., v. Stewart*, 833 A.2d 961, 979 (Del. Ch. 2003) (observing that some personal friendships "may border on or even exceed familial loyalty and closeness"), *aff'd*, 845 A.2d 1040 (Del. 2004). See generally Levinson, *supra* note 29, at 647

else)²⁵⁸ from confiding in their friends,²⁵⁹ as the present scheme of testimonial privileges so clearly does.²⁶⁰ There is, in particular, little principled reason for the courts to recognize a parent-child privilege without also recognizing a comparable friendship privilege.²⁶¹ As one commentator observed: “[M]any individuals may share their closest, most confidential communications with someone other than a spouse, child, or parent. In such cases, it may indeed seem unfair to protect communications between a child and parent who may or may not be close, but not between lifelong friends.”²⁶²

(lamenting the fact that “the present scheme of privileges actually denigrates the general importance of private intimate relationships”).

258. Among other things, the absence of a friendship privilege may discourage the types of conversations in which people could “warn a close friend . . . of the folly of being involved in criminal activity . . . in an effort to cause him to mend his ways.” *In re Anonymous*, 5 Pa. D. & C.4th 44, 56 (Pa. Disciplinary Bd. 1988). Tellingly, a similar consideration underlies the psychotherapist-patient privilege:

[C]ommunications regarding intentions or desires to commit future crime are at the very heart of why a patient may seek psycho-therapeutic care. A patient may reveal these dangerous, criminal impulses to the therapist for the very purpose of overcoming and not acting on them.

Whether or not the patient is truly seeking help to overcome these impulses . . . , revealing them to the therapist creates an opportunity for intervention that is critical to the psychotherapist’s professional purpose.

George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 61–62 (1999).

259. *See State v. Albo*, 584 P.2d 906, 911 (Utah 1978) (Maughan, J., dissenting) (asserting that “one should . . . be able to have some control over . . . the persons one chooses to confide in”); Covey, *supra* note 37, at 897 (asserting that “[i]ntimacy and privacy in personal relationships must be left to the judgment of each individual”).

260. *See Levinson, supra* note 29, at 645 (“A person may have a privileged relationship with his psychiatrist, but not with his psychologically astute close friend or colleague.”); Mueller, *supra* note 235, at 955 (“There is no general right to block inquiry into confidential communications with . . . friends, where surely all of us seek and obtain help and support in adjusting to the world and working through the problems of living.”); Garber, *supra* note 30, at 926 (“The [psychotherapist] privilege requires the therapist to be a licensed mental health professional, therefore confidential communications made to friends . . . in an effort to gain support or help are not privileged.”).

261. *See People v. Sanders*, 457 N.E.2d 1241, 1245 (Ill. 1983) (“Were we to recognize . . . a [parent-child] privilege under our judicial authority, it would be impossible to contain it logically from spreading . . . to close friends.”); *see also* Covey, *supra* note 37, at 894 (“[O]nce a parent-child privilege is recognized, litigants will clamor for privileges covering other close relationships, such as between best friends or relatives, based on the same social policy grounds as those underlying the parent-child privilege.”).

262. Covey, *supra* note 37, at 894; *see also* Levinson, *supra* note 29, at 651 (“One may, to be sure, be particularly bothered by the possibility of a child or parent called upon to testify against one another,

VII. THE DEFINITIONAL IMPEDIMENT TO THE RECOGNITION OF A FRIENDSHIP PRIVILEGE

A. *The Nature of the Problem*

Despite his enthusiasm for a friendship privilege,²⁶³ Professor Levinson acknowledged the existence of a fundamental problem in identifying those who would be protected by the privilege.²⁶⁴ Professor Schoeman also viewed this definitional challenge as an impediment to the privilege's recognition:

[W]hile it is in general clear who is married to whom and what rights and responsibilities are present in the case of persons married to one another, it is not clear what the friendship relationship involves, in part because there are many levels of friendship; nor is it clear who is friend to whom and at what level; nor, finally, is it clear what the range of rights and responsibilities are in the case of friendships.²⁶⁵

One potential solution to this problem would be for state legislatures (or perhaps Congress)²⁶⁶ to create a friendship

but one then has to ask why the same sorts of concerns do not arise when best friends . . . are asked to testify in similar situations.”).

263. Levinson is generally deemed to have argued “on behalf of a testimonial privilege for friends.” *Parent-Child Loyalty*, *supra* note 26, at 925 n.80 (discussing Levinson, *supra* note 29). However, his position is somewhat more nuanced than this characterization suggests. Although he asserted that “a genuine commitment to the values of friendship and private life will require significant changes in the way we defend and explain, or explain and reject, the traditional testimonial privileges,” he also noted that any “rejection of the status quo” could take the form of “either expansion *or* limitation of the existing privileges[.]” Levinson, *supra* note 29, at 643–44 (emphasis added).

264. See *Parent-Child Loyalty*, *supra* note 26, at 925 n.80 (“A testimonial privilege for friends would present the problem, clearly recognized by Levinson, of how to determine which of a person’s ‘friends’ would be excused from testifying.”).

265. Schoeman, *supra* note 33, at 266; see also *Brown v. Comcast Corp.*, No. ED CV 16-00264-AB (SPx), 2016 WL 9109112, at *5 (C.D. Cal. Aug. 12, 2016) (“To begin to define what could be considered a friendship relationship creates endless concerns. Unlike a marital or parent-child relationship, a friendship relationship has no accepted biological or legal inception.”); *Marshall v. Local Union 20, Int’l Bhd. of Teamsters*, No. C 78-407, 1979 WL 1864, at *3 (N.D. Ohio Mar. 30, 1979) (“[H]ow is it to be determined what constitutes a friend? Does the term require a strictly personal relationship, or does it extend to mutual friends? Or friends of friends?”), *aff’d*, 611 F.2d 645 (6th Cir. 1979).

266. Although Congress has the authority to create and define the scope of a privilege by statute, it “has preferred to leave to the courts questions of which privileges to recognize and when to apply them.” *In re Sealed Case*, 676 F.2d 793, 807 n.45 (D.C. Cir. 1982); see also *Marshall v. Anderson*, 459 So.

privilege,²⁶⁷ and, as part of the legislative process,²⁶⁸ identify those individuals who would be entitled to claim the protection of the privilege.²⁶⁹ However, Levinson himself did not favor this approach,²⁷⁰ and it is by no means clear that legislatures could establish a satisfactory definition of the term “friend.”²⁷¹ Because the word traditionally encompasses individuals in a broad range of relationships,²⁷² not all of whom would have an equal claim to the benefits of a testimonial privilege,²⁷³ it may be preferable to

2d 384, 386 n.7 (Fla. Dist. Ct. App. 1984) (“[V]irtually the entire federal law of privilege is based upon the common law rather than either rule or statute.”).

267. See *Hartsock v. Goodyear Dunlap Tires N. Am. Ltd.*, 813 S.E.2d 696, 699 (S.C. 2018) (“[A] privilege may be created by statute’ as deemed appropriate by Congress or a state legislature.” (quoting *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982))); cf. *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1205–06 (Mass. 1983) (“In recent years . . . courts have tended to leave the creation of evidentiary privileges to legislative determination.”).

268. See *State ex rel. Thomas v. Schneider*, 130 P.3d 991, 995 (Ariz. Ct. App. 2006) (“[I]n promulgating its evidentiary rules, the [Arizona] supreme court deferred to any legislative definition of ‘privilege.’” (construing ARIZ. R. EVID. 501)); see also Covey, *supra* note 37, at 899 (“Legislation has an advantage over judicial recognition of privileges in that a statute is easier to administer, and relieves the courts of having to make difficult case-by-case evaluations of whether a common law privilege should apply.”).

269. See Gelzinis, *supra* note 31, at 527–28 (“Legislators may be able to develop a general definition, and Florida and New York have crafted broad legal definitions of a friend for the purpose of making healthcare proxy decisions.” (citing FLA. STAT. ANN. § 765.101 (West 2010) and N.Y. PUB. HEALTH LAW § 2961 (McKinney 2007))).

270. See Levinson, *supra* note 29, at 654 (“[T]he State should define as minimally as possible, if at all, those who are entitled to play a role as over confidantes.”); cf. Michael L. Closen & Joan E. Maloney, *The Health Care Surrogate Act in Illinois: Another Rejection of Domestic Partners’ Rights*, 19 S. ILL. U. L.J. 479, 496 (1995) (“Is not close friendship in the eyes of the beholder? Indeed, is it not the case that many people tend to regard themselves as closer to certain other people than the other people would agree?”).

271. See Closen & Maloney, *supra* note 270, at 495 (discussing a statute that “purports to do the impossible, to define a close friend”); Covey, *supra* note 37, at 898 (“Statutes can and do specify when a parent-child relationship exists and when it is terminated. Specifications of this sort would be difficult if not impossible to formulate for nonfamilial friendships.”).

272. See *Phillips v. State*, 271 P.3d 457, 469 (Alaska Ct. App. 2012) (“There are many levels or degrees of friendship in our society.”); *People v. Forbes*, 49 Cal. Rptr. 2d 836, 840 (Ct. App. 1996) (“[T]he word ‘friend’ has numerous meanings”); *People v. Thompson*, 252 Cal. Rptr. 698, 700 (Ct. App. 1988) (“‘Friends’ is a common term with a variety of connotations.”); *Carr v. United States*, 531 A.2d 1010, 1014 (D.C. 1987) (noting that the term “‘friend’ can have a wide range of meanings”).

273. See *Law Offices of Herssein & Herssein v. United Servs. Auto. Ass’n*, 271 So. 3d 889, 894 (Fla. 2018) (“[F]riendship’ in the traditional sense of the word does not necessarily signify a close relationship. It is commonly understood that friendship exists on a broad spectrum: some friendships are close and others are not.” (citation omitted)); *State v. Hattaway*, 156 So. 159, 160 (La. 1934) (“Some friendships are purely casual; others are close, intimate, and of long standing.”); *United States Tr. Co. v. Montclair Tr. Co.*, 33 A.2d 901, 904 (N.J. Ch. 1943) (“The word ‘friends’ has no precise meaning. It is commonly used to describe undefinable relations which vary in degree from the greatest intimacy to

leave the courts with “a measure of flexibility in determining whether, in all the circumstances involved, certain communications should be protected.”²⁷⁴ As one court observed:

Just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope of the privilege be considered. This is necessarily so because the appropriate scope of a privilege, like the propriety of the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.²⁷⁵

However, leaving the resolution of the definitional problem to a judicial determination on a case-by-case basis may be equally unsatisfactory,²⁷⁶ as courts may be no more successful than legislatures in defining the term “friend” or “friendship.”²⁷⁷ As one court observed nearly a century ago:

The word ‘friends’ . . . has no accepted statutory or other controlling limitations, and in fact has no precise sense at all. Friendship is a word of broad and varied application. It is commonly used to describe the undefinable relationships which exist not only between those connected by ties of kinship

an acquaintance more or less casual.” (citation omitted)); *Int’l Bank of Commerce v. Int’l Energy Dev. Corp.*, 981 S.W.2d 38, 45 (Tex. App. 1998) (“The term ‘friend’ is used loosely in the English language and can refer to a person one knows well or one who is more correctly termed an acquaintance. An acquaintanceship springs from occasional interaction so that one knows a person but is not especially familiar with him or her.” (citations omitted)).

274. Comm. on Fed. Courts, *Revisiting the Codification of Privileges Under the Federal Rules of Evidence*, THE RECORD, Jan./Feb. 2000, at 148, 153; cf. *In re Admin. Subpoena Blue Cross Blue Shield of Mass.*, 400 F. Supp. 2d 386, 389–90 (D. Mass. 2005) (observing that “courts have the power to be flexible and adaptive with regard to the law of privilege”). See generally Krattenmaker, *supra* note 128, at 657 (“[I]t is not necessary, in order that a testimonial privilege substantially further enjoyment of the right of privacy, that it be carefully defined at the time the communication occurred.”).

275. *In re Zuniga*, 714 F.2d 632, 639–40 (6th Cir. 1983) (citations omitted); see also *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 230 (3d Cir. 2007) (“Rule 501 requires the federal courts, in determining the nature and scope of an evidentiary privilege, to engage in the sort of case-by-case analysis that is central to common-law adjudication.”).

276. See Covey, *supra* note 37, at 898 n.164 (“Determinations of the closeness of friendships on a case-by-case basis would consume too much time and would require guesswork.”); cf. Gelzinis, *supra* note 31, at 528 (“Although every person feels they could say with precision who their closest friends are, the vague standards and individual preferences by which we all make these judgments present a significant challenge for any public-policy maker.”).

277. See *Hogan v. Henderson*, 102 F. Supp. 2d 1180, 1190 (D. Ariz. 2000) (“Friendship relationships are truly a mystifying phenomenon for one knows not why any particular pair connects or rubs each other the wrong way.”), *aff’d*, 15 F. App’x 458 (9th Cir. 2001); see also *Thompson*, 252 Cal. Rptr. at 701 (“[A] judge or jury might have differing views concerning the intensity of the relationship involved in a friendship”).

or marriage, but as well between strangers in blood, and which vary in degree from the greatest intimacy to an acquaintance more or less casual.²⁷⁸

B. *Some Suggested Solutions to the Problem*

Some commentators have suggested less conventional solutions to the definitional problem underlying the recognition of a friendship privilege.²⁷⁹ These include Professor David Chambers' suggestion that individuals be permitted "to register their friendships formally with a government office."²⁸⁰ Under Chambers' proposal, individuals could "fill in a form, get it notarized or witnessed,"²⁸¹ and then "come to a government office and register as 'designated friends.'"²⁸² Those who availed themselves of this opportunity would be "entitled to the same testimonial privileges as spouses in civil and criminal cases if they enter[ed] the designated friend relationship at least two years prior to the event giving rise to the case."²⁸³

278. *Clark v. Campbell*, 133 A. 166, 170 (N.H. 1926) (emphasis added); see also Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315, 344 (2000) ("The term 'friend' describes someone with whom one shares a relationship that may vary from something slightly more than bare acquaintance to one in which the parties . . . share an abiding trust and confidence."). One commentator described the problem in the following terms:

[W]ithout institutional form, without a clearly defined set of norms for behavior or an agreed-upon set of reciprocal rights and obligations, without even a language that makes distinctions between the different kinds of relationships to which we apply the word, there can be no widely shared agreement about what is a friend.

RUBIN, *supra* note 120, at 8.

279. See, e.g., Adam M. Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell – And Other Combinations*, 103 CAL. L. REV. 919, 934–35 (2015) (noting that where "a friend [is] holding another friend's confidence . . . more than one person's interests are implicated," and the law might require that the confidence be maintained "until all those with access to the information consent to . . . disclosure"). See generally Abrams, *supra* note 22, at 1127 ("[T]here are . . . different approaches to the idea of friendship.").

280. Gelzimis, *supra* note 31, at 528–29 (discussing David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1353 (2001)).

281. Chambers, *supra* note 280, at 1359. One court explained that "the purpose behind notarization is twofold: to verify the identity of the person signing the document and to ensure that person understands that he subjects himself to penalties of perjury in the statement." *People v. Allen*, 32 N.E.3d 615, 626 (Ill. 2015).

282. Chambers, *supra* note 280, at 1353. For an extended discussion of how such a friendship registry might operate, see Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573 (2013). Professor Aloni argued that "one act of registration" might avoid "the hassle of providing documentation and other proof of the relationship to employers, judges, and administrators." *Id.* at 604–05.

283. Chambers, *supra* note 280, at 1353. Professor Chambers' proposed delay in the attachment of the privilege would distinguish it from the marital communications privilege it purportedly would

Professor Schoeman proposed a similar system whereby persons who wished to claim the benefit of a friendship privilege could execute notarized documents reflecting that intent.²⁸⁴ Schoeman argued that after a significant period of time—he suggested six months—the parties should be required to reaffirm their relationship,²⁸⁵ once again before a notary.²⁸⁶ From this point forward, confidential communications between these formally designated friends would be privileged “on a renewable yearly basis.”²⁸⁷

Both Chambers’ and Schoeman’s proposals seem impractical,²⁸⁸ in part because most people are never seriously at risk of being compelled to testify against a friend (or having a friend testify against them),²⁸⁹ and thus may not perceive the need for the protection of a testimonial privilege until they (or a friend) are actually required to testify.²⁹⁰ Even more fundamentally, few people are likely to have the type of relationship with a friend that would

mirror. See Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373, 386–87 (2001) (“[M]arried couples . . . need not wait a year after the solemnization of their marriage to obtain the privileges conferred by marital status; the privileges begin immediately.”).

284. See Schoeman, *supra* note 33, at 268 (proposing notarized documents for friendship privilege).

285. This requirement presumably reflects Schoeman’s recognition that “most of us in fact change our closest friendships over time.” Levinson, *supra* note 29, at 656 n.69. See, e.g., *State v. Richardson*, 395 S.E.2d 143, 146 (N.C. Ct. App. 1990) (describing a relationship that “deteriorated from one of friendship and confidence sharing to one of animosity”); see also Rosenbury, *supra* note 151, at 203–04 (observing “individual friendships can be fluid and shifting”).

286. See Schoeman, *supra* note 33, at 268 (highlighting how a relationship with a friend can be reaffirmed).

287. Schoeman, *supra* note 33, at 268. In a brief article that has received relatively little subsequent attention, Judge Edwin Ludwig advocated for the recognition of “friendage” agreements that would “resemble business partnership agreements” and be valid for a “term of years, with renewal options.” Judge Edmund V. Ludwig, *Friendage*, 3 ROGER WILLIAMS U. L. REV. 149, 158, 162 (1997).

288. See Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 BUFF. L. REV. 1, 24–25, 25 n.110 (1995) (asserting “a formal agreement of confidentiality” between friends would be “eminently impractical” because “[i]t is hard to conceive of friends writing up a contract before they talk”). See generally Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649 (2010) (examining the relationship between contract law and friendship).

289. See generally Thomas E. Baker, *The Eleventh Circuit’s First Decade Contribution to the Law of the Nation, 1981–1991*, 19 NOVA L. REV. 323, 331 (1994) (stating “the average person likely will only see the inside of a courtroom . . . when called to jury duty”).

290. See *State v. Gutierrez*, No. S-1-SC-36394, slip op. at 17 (N.M. Aug. 30, 2019) (asserting “most people seldom appear in court and do not tailor their conversations around what may or may not be privileged”); cf. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 82 (1993) (“That friends must testify against each other may come as a surprise.”).

entail registering it with the government²⁹¹ or formally documenting its confidential nature in some other manner.²⁹²

Alluding to the inherent informality of the relationship,²⁹³ noted social scientist Lillian Rubin observed that “no clear lines mark the beginnings of a friendship; often none mark the ending either.”²⁹⁴ Friendship instead “is a *non-event*—a relationship that just *becomes*, that grows, develops, waxes, wanes and, too often perhaps, ends, all without ceremony or ritual to give evidence of its existence.”²⁹⁵ Indeed, some scholars deem this informality to be the very hallmark of true friendship.²⁹⁶ As one of those scholars explained:

Keeping trusted information private is customarily a moral and casual, not a contractual, commitment. Friends do not habitually enter into legally enforceable contracts for privacy. Whereas asking for confidentiality with verbal and nonverbal cues is a socially accepted convention, requesting that a friend sign (or click) a document ensuring the privacy of communications

291. See *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass’n*, 271 So. 3d 889, 898 (Fla. 2018) (“[P]eople traditionally ‘communicate’ the existence of their friendships by choosing to spend time with their friends in public, introducing their friends to others, or interacting with them in other ways that have a public dimension.”).

292. See, e.g., Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 280 (1998) (“A person intending to tell her friend that she has tested positive for the HIV virus . . . is unlikely to bargain for a return promise not to disclose the information. Parties in such intimate relations . . . typically do not make contractual bargains.”); see also Dolinko, *supra* note 177, at 1114 (observing “people do not typically obtain explicit promises of confidentiality before conveying information to others”).

293. See *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (contrasting “informal relationships based on kinship and friendship” with “formal relationships created by contract and rule”); RUBIN, *supra* note 120, at 4 (“There are no social rituals, no public ceremonies to honor or celebrate friendships of any kind, from the closest to the most distant—not even a linguistic form that distinguishes the formal, impersonal relationship from the informal and personal one.”).

294. RUBIN, *supra* note 120, at 4; see also Leib, *supra* note 288, at 696 (observing “friendship tends to be fluid” and “does not rely on formalities for entry or exit”); Agee, *supra* note 106, at 373 (“Friendship is freely, and often casually, entered into and exited from with no formal contracts or explicit boundaries.”).

295. RUBIN, *supra* note 120, at 5; see also Kerr, *supra* note 40, at 4 (“[F]riendship . . . is organic, or occurs over time”).

296. See, e.g., Dane, *supra* note 149, at 1182 (“Close friendship . . . is accorded a distinct and honored place in our culture precisely because of its lack, on the whole, of legal form.”); see also Rosenbury, *supra* note 151, at 206 (asserting friendship “thrives on lack of state recognition”).

made within the relationship can signal distrust and be noxious to the friendship.²⁹⁷

Tellingly, Schoeman himself described his proposal for the licensing of friendships as “a potentially dangerous role for the state to engage in and a disastrous omen for the future of friendship.”²⁹⁸ Chambers, in turn, speculated that “almost no one” would register their friendships with the state under his proposal because those eligible to do so might “never hear about the opportunity or, if they did hear about it, would conclude that the benefits are too few or too remote to be worth the effort.”²⁹⁹ If this is indeed the case,³⁰⁰ Chambers’ and Schoeman’s proposed requirement that the parties’ friendship be documented significantly in advance of their assertion of the privilege (two years in Chambers’ case,³⁰¹ and at least six months under Schoeman’s proposal)³⁰² would seem to render the protection afforded by their proposals illusory.³⁰³

297. Patricia Sánchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689, 705 (2010) (footnote omitted); cf. Leib, *supra* note 288, at 679 (“Although agreements and understandings between parties to . . . friendships are not at all rare, the parties frequently wish to avoid formalities. It is not in the spirit of the relationship to get too formal, and the very request for a formality from one of the parties signals to the other that perhaps the relationship is taking on a rather different character.”).

298. Schoeman, *supra* note 33, at 268. Professor Richard Stith also argued forcefully against the creation of a “State Friendship Registry,” posing a series of rhetorical questions to illustrate his concerns:

Consider, if you will, not only economic costs, but also the quality of civil society. . . . Even if the government used mainly positive incentives . . . to support its scheme, would there not be too great an intrusion into private life? Would we not have lost too much freedom and flexibility in our personal relationships? Would we not have created an excessive bureaucracy?

Richard Stith, *Keep Friendship Unregulated*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 263, 271 (2004).

299. Chambers, *supra* note 280, at 1357; cf. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 925 (2005) (“In the vast majority of . . . situations, the law does not matter much to people who disclose private information about themselves. When we disclose sensitive information to friends, the law generally has little effect on our expectations that these friends will keep the information secret.”).

300. See Kaufman, *supra* note 35, at 658–59 (“It is conceivable that the law neglects friendship because that relationship is so natural or fundamental to Americans that it need not be regulated.”); Leib, *supra* note 288, at 717 (“The effort to protect friendships (mostly by punishing bad and false friends) would have the perverse effect of discouraging them.”).

301. See *supra* notes 280–83 and accompanying text.

302. See *supra* notes 284–87 and accompanying text.

303. There is, of course, also the impracticability of expecting people to formalize their relationships with all of the various friends with whom they ultimately might need or want to have a privileged relationship. See Rosenbury, *supra* note 151, at 203 (observing “[m]any types of friendships

C. *Professor Levinson's Ticket Proposal*

Professor Levinson proposed an alternative solution to the definitional problem whereby the state would issue everyone a limited number of “privilege tickets”³⁰⁴ that “could be distributed to those with whom a person wished to assure a relationship that could not be vulnerable to State intervention and forced testimonial disclosure.”³⁰⁵ Like Professor Chambers,³⁰⁶ Levinson posited that a state could regulate this privilege through the use of a state friendship registry,³⁰⁷ which would mitigate the risk that an individual would “thrust[] a privilege ticket into [a] confederate’s hands just before the commission of a crime.”³⁰⁸

Although Levinson acknowledged that registration with the state would result in some invasion of the registrants’ privacy,³⁰⁹ he insisted that this invasion would be “little greater than the similar incursion involved in having to purchase a marriage license.”³¹⁰ He also suggested that those concerned about the potential invasion of privacy could draw some comfort from the fact that the information contained in individual income tax

can develop and coexist”); RUBIN, *supra* note 120, at 58 (noting the fact that “many friends are possible” is a benefit of friendship “not easily found in other intimate relationships, with their emphasis on exclusivity”).

304. See Levinson, *supra* note 29, at 655 (“The privilege-ticket plan responds to the basic problem that there is no empirical test by which to distinguish relationships worth protecting from those that are not.”).

305. *Id.* Levinson assumes that a “commitment to some kind of crime-control policy” would limit society’s “willingness to give every individual an unlimited supply of privilege tickets.” *Id.* at 659. But see Rosenbury, *supra* note 151, at 230 (“Why should individuals be forced to choose one friend over others for purposes of legal recognition?”).

306. See *supra* notes 280–83 and accompanying text.

307. See Levinson, *supra* note 29, at 657 (“Modern computers can easily be programmed to handle a central registry of privilege tickets.”).

308. *Id.* at 657.; cf. Schoeman, *supra* note 33, at 267 (“[R]ecognizing a privilege for intimate friendship would give persons conspiring to commit a crime a facile means of precluding admission of excellent sources of evidence simply by pretending that they are intimate friends.”).

309. See Levinson, *supra* note 29, at 657 (observing “[t]here is, of course, an incursion on privacy in requiring public registration” that would “give the State entree into the intimate lives of its citizenry simply by looking up the lists”); cf. Schoeman, *supra* note 33, at 267 (“[S]ince it is not clear who is an intimate friend to whom, the state could in principle recognize the privileges of confidential communication only after investigating the relationship to see if there really is an intimate relationship being protected. But the very act of making this investigation . . . involves an intrusion into the relationship one might be seeking to protect . . .”).

310. Levinson, *supra* note 29, at 657; cf. *Aquino v. Bulletin Co.*, 154 A.2d 422, 427 (Pa. Super. Ct. 1959) (asserting there is no “unwarranted invasion of the right of privacy by reporting, within a reasonable time, the issuance of a marriage license, . . . regardless of how anxious the parties involved may be to keep the information from the public”).

returns is generally kept confidential,³¹¹ despite the inherently public nature of those documents.³¹²

Levinson's analysis probably overstates the confidentiality of income tax returns³¹³ and, thus, by implication, of the information potentially contained in a state friendship registry.³¹⁴ He also ignores the possibility that the current income tax system represents precisely the kind of government bureaucracy those likely to oppose the creation of a friendship registry might be seeking to avoid.³¹⁵ In any event, Levinson apparently would not object to a system that, like Professor Schoeman's,³¹⁶ would

311. The Internal Revenue Code "requires officers or employees of the United States to maintain the confidentiality of tax returns and 'return information' regarding specific taxpayers." *Tax Analysts v. IRS*, 391 F. Supp. 2d 122, 130 (D.D.C. 2005) (quoting 26 U.S.C. § 6103). All of the states have laws imposing similar requirements on their taxing agencies and officials. *See People v. Gutierrez*, 222 P.3d 925, 933 (Colo. 2009) (en banc) ("[E]very . . . state in the country (including the District of Columbia) has adopted an analogous statutory regime, evincing a national consensus that taxpayers' tax returns are considered confidential, private communications . . ."). These confidentiality requirements "stem in part from the private nature of the sensitive information contained [in individual tax returns], and in part from the public interest in encouraging the filing by taxpayers of complete and accurate returns." *Smith v. Bader*, 83 F.R.D. 437, 438 (S.D.N.Y. 1979).

312. *See Levinson, supra* note 29, at 657 n.71 ("[T]he duty to register does not entail that the information is open to public view. Consider the confidentiality accorded to income-tax returns, for example, despite the fact that they are obviously 'public' documents that we are required to fill out."); *cf. Weingarten v. Superior Ct.*, 125 Cal. Rptr.2d 371, 377 (Cal. Ct. App. 2002) ("[W]e caution against compelled disclosure of personal tax returns except in those rare instances where the public policy underlying the tax privilege is outweighed by other compelling public policies or where waiver principles apply.").

313. *See, e.g., United States v. Richey*, 924 F.2d 857, 857 (9th Cir. 1991) (affirming the conviction of a former Internal Revenue Service employee for willfully disclosing to the public information about a certain federal income tax return); *see also* Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065, 1102 (2003) ("With so much taxpayer information at the IRS's disposal, individualized cases of misuse and inadvertent leakage of tax return information outside the agency seem inevitable."). One federal court observed that although "circuit court authority on this issue is scant, the district courts have held in numerous cases that tax returns are subject to discovery in appropriate circumstances." *Heathman v. United States Dist. Ct.*, 503 F.2d 1032, 1035 (9th Cir. 1974) (citations omitted). *See generally* William A. Edmundson, Note, *Discovery of Federal Income Tax Returns and the New "Qualified" Privileges*, 1984 DUKE L.J. 938 (discussing the academic perspective of this issue).

314. Levinson himself described as "altogether too plausible" the possibility that the state "could not itself be trusted to obey laws prohibiting . . . inspection" of the records contained in a friendship registry. *Levinson, supra* note 29, at 657.

315. *See generally* Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDEP. L. REV. 319, 319–20 (1994) (lamenting the complexity of the federal income tax system and the failure of repeated congressional efforts to simplify that system).

316. Schoeman asserted that because government registration would not necessarily be required in order to effectuate his proposal, "no one besides the parties to the relationship need know of their status unless one of them formally calls attention to it in court." Schoeman, *supra* note 33, at 268.

enable friends to conceal their relationship from the public until it serves their private interests to do otherwise:

[T]here may be a relatively easy answer [to the privacy concerns underlying a privilege ticket system], which is to make the tickets, like personal checks or bearer bonds, effective upon being filled in and dated by the holder of the ticket. Presumably such filled-in tickets could be kept in safety-deposit boxes, like other valuables, ready to be produced when needed.³¹⁷

VIII. CONCLUSION

Should the law recognize a testimonial privilege protecting confidential communications between friends,³¹⁸ as Professor Levinson and a few other scholars have suggested?³¹⁹ As is the case with other potential new privileges,³²⁰ there is no definitive answer to this

317. Levinson, *supra* note 29, at 657–58. In this event, Levinson apparently would support the imposition of a delay in the effectiveness of a privilege ticket similar to the “waiting periods” favored by Chambers and Schoeman:

[T]he State might well decree that no ticket is valid until some period of time, whether thirty days or nine months, after its issuance by the individual. This waiting period would serve to discourage one’s ticketing another not out of concern for the inherent quality of the relationship but rather because of the specific information being revealed and the potential for harm if it were ever disclosed to the authorities.

Id. at 657.

318. One commentator argued that testimonial privileges should encompass a “sense of fair play . . . wherein it would be too easy, and hence unfair and against the ‘rules of the game,’ to hound a man to his doom by convicting him through the lips of his own intimate friends [or] family.” Douglas L. Manley, *Patient, Penitent, Client and Spouse in New York*, 21 N.Y. ST. B. ASS’N BULL. 288, 290 (1949); *see also* Kaufman, *supra* note 35, at 658 (“Perhaps the law should respond to the absence of friendship from contemporary discourse by developing doctrine which expressly protects that relationship. The Supreme Court, for example, might instantly recognize a right to friendship. . . . And the law of evidence would privilege communications between friends.”).

319. *See* Capers, *supra* note 153, at 726 (“[O]ne could seek to protect those individuals (the majority of us?) who are more likely to confide in a friend than a family member. In other words, there could be an evidentiary privilege for confidential communications between friends, as Sanford Levinson has suggested.”); Markel et al., *supra* note 26, at 1205 n.316 (discussing Levinson’s “effort to think through how we might furnish testimonial privileges to friends”).

320. *See, e.g., In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. 999, 1010 n.12 (D.N.J. 1989) (“For a small percentage of people the psychotherapist-patient privilege may have a marked bearing on the efficacy of their therapy and in a small percentage of judicial proceedings the psychotherapist-privilege may have a marked bearing on the accuracy of proceedings. Which is more important? This question is not subject to empirical validation but calls instead for the weighing

question.³²¹ Although the federal and many state courts undoubtedly have the authority to recognize a friendship privilege,³²² courts have traditionally been reluctant to recognize new privileges³²³ “even when persuasive justifications support the privilege.”³²⁴

Moreover, despite the possible arguments made in support of a friendship privilege,³²⁵ the definitional and administrative problems Levinson identified are real.³²⁶ Those problems would not be adequately remedied by his proposal (and those of other commentators)³²⁷ that the parties

of values.”) (quoting Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 928 (1982)).

321. See, e.g., Leib, *supra* note 30, at 700 (“Should the law of evidence allow us to claim a friendship privilege? That is a question I cannot answer here . . .”); see also *Gale v. State*, 792 P.2d 570, 624 n.25 (Wyo. 1990) (Urbigkit, J., dissenting) (“One can never prove that costs outweigh benefits or vice-versa with regard to a particular privilege: such arguments inevitably degenerate into simple unsupported assertions.” (quoting *Developments in the Law*, *supra* note 43, at 1666)).

322. See, e.g., *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 44 (D.D.C. 2007) (asserting “[p]reviously unrecognized common law testimonial privileges may be recognized by federal courts”); *In re Grand Jury Subpoena*, 926 A.2d 280, 284 (N.H. 2007) (“[T]he court has the inherent power to ‘develop new rules of privilege on common-law principles in cases coming before it.’” (quoting N.H. R. EVID. 501)); see also Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1803 (1996) (noting “courts continue to have the power to recognize the existence of a privilege”).

323. See, e.g., *Port v. Heard*, 594 F. Supp. 1212, 1219 (S.D. Tex.—Houston 1984) (“The federal courts have generally approached the creation or recognition of new privileges against giving testimony with extreme caution. . . . [P]rivileges are disfavored generally and are created or newly-recognized but rarely.”); *aff’d*, 764 F.2d 423 (5th Cir. 1985); *In the Matter of a Grand Jury Subpoena*, 722 N.E.2d 450, 455 n.12 (Mass. 2000) (“We have recognized very few common-law privileges.”); see also *In the Matter of Gail D.*, 525 A.2d 337, 339 (N.J. Super. Ct. App. Div. 1987) (“[T]he recognition of a privilege not . . . firmly embodied in common-law has usually been the subject of judicial restraint”).

324. Franklin, *supra* note 67, at 166; cf. *In re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F. Supp. 332, 336 (E.D.N.Y. 1998) (“The inability . . . to reach agreement on the costs and benefits of a . . . privilege strongly cautions against . . . finding that such a privilege should . . . be enshrined in common law.”).

325. See Schoeman, *supra* note 33, at 257–58 (asserting “principled arguments can be adduced for expanding testimonial privileges into areas not presently contemplated—specifically to cover confidential communication between intimate friends”); *Parent-Child Loyalty*, *supra* note 26, at 924–25 (“[A] spirited argument can be made for conferring a testimonial privilege upon close friends, who . . . feel a sense of loyalty that is generally admired and valued in our society.”).

326. See Gelzinis, *supra* note 31, at 527 (“Any attempt to give friendships a firmer legal footing runs into the problem of defining precisely who a friend is.”); Kerr, *supra* note 40, at 4 (“A definition for friendship has been perennially elusive.”). But see *Light v. NIPSCO Indus., Inc.*, 747 N.E.2d 73, 77 (Ind. Ct. App. 2001) (Mathias, J., dissenting) (“A friend is no less a friend because the law does not define what friendship is.”).

327. See, e.g., Gelzinis, *supra* note 31, at 529 (noting Professor Chambers’ proposal “recognizes that individuals are best suited to say who their close friends are”); see also *Rosenbury*, *supra* note 151,

themselves be permitted to define the protected relationship.³²⁸ This difficulty alone might warrant the rejection of a friendship privilege.³²⁹ One commentator made this point in the following terms:

[T]he law does not and cannot reasonably grant protection to every close relationship formed among nonfamily members. Administration of such a privilege would be extremely difficult—involving problems of defining intimate relationships, determining expectations within the relationship, and, importantly, weeding out collusive schemes among friends.³³⁰

Even Levinson ultimately seemed uncertain of the merits of a friendship privilege,³³¹ and in particular, of the viability of his privilege ticket proposal.³³² His proposal has drawn little interest from the courts and

at 203 (“On the most basic level, the state does not specify the terms of friendship, leaving it up to individuals to define the interaction.”).

328. *See* *Atene v. Lawrence*, 239 A.2d 346, 350 (Pa. 1968) (“‘friends’ is an elastic term and, when its limits are left to the judgment or imagination of the interrogated person, it could include the merest acquaintances”); RUBIN, *supra* note 120, at 8 (noting “one person will claim as a friend someone who doesn’t reciprocate”); *cf.* Kerr, *supra* note 40, at 5 (“We might not want the law . . . requiring us to draw lines, and sometimes we ourselves might be unsure of where we want our relationships to fall on the spectrum of acquaintance to pal.”).

329. *See* Kaufman, *supra* note 35, at 655 (asserting the law’s failure to recognize a friendship privilege “may be justified because of the difficulty of defining and limiting the friend-friend relationship”); *cf.* *Pearson v. Miller*, 211 F.3d 57, 71 (3d Cir. 2000) (“There is good reason for favoring relatively uncomplicated confidential relationships in assessing candidates for the application of evidentiary privileges as contemplated by Rule 501.”); Covey, *supra* note 37, at 898 (“Ease in identifying protected parties plays an important role in the creation of new privileges.”).

330. Covey, *supra* note 37, at 897; *cf.* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. Rev. 1, 60 (2009) (“Courts regularly provide testimonial privileges designed to protect the confidentiality and intimacy of particular kinds of relationships. . . . Not all worthy relationships receive these benefits, however. Loving, but non-marital, relationships are denied the privilege, as are other forms of friendship.”).

331. Revisiting the issue a number of years after his privilege article was published, Levinson observed: “Our legal system does not privilege friendship (or even family relations) above the duties of citizenship, and I do not necessarily believe this is a bad thing.” Sanford Levinson, *Afterword*, 38 TULSA L. REV. 779, 789–90 (2003).

332. *See* Levinson, *supra* note 29, at 661 (“The additional ‘freedom’ allowed by the privilege-ticket plan would be illusory. It would be more than offset by the discontent attendant on its private administration. The present scheme, problematic as it may be, has the virtue of not encouraging constant calibration of the levels of one’s relationships. . . . Indeed, ‘friendship’ itself might even be diminished as a result of the additional recognition that it is not a “natural” status, but instead the product of specific cultures and ways of life that are capable of transformation.”).

other commentators,³³³ as he has acknowledged³³⁴ and clearly even anticipated.³³⁵ As another commentator explained:

Sanford Levinson argues . . . that as a matter of principle friends should be included within the privilege to remain silent. But on the way from principle to workable rule, the point often gets lost. The law is a rough instrument, and despite these sentiments repeatedly voiced, the rules of privilege cover only some relationships of loyalty.³³⁶

Nevertheless, Levinson convincingly argued that the law is undervaluing friendship by failing to accord friends the same freedom from testimonial compulsion enjoyed by married persons and, in some jurisdictions,³³⁷ those in other intimate family relationships.³³⁸ At a minimum, Levinson's "provocative argument on behalf of a testimonial privilege for friends"³³⁹ deserves more serious consideration than it has received to date.³⁴⁰

333. See Leib, *supra* note 30, at 699 ("Levinson's particular proposal—allowing people to issue a finite number of 'privilege' tickets to whomever they want, including friends and family—has gained little traction and no adherents.").

334. See Sanford Levinson, *Structuring Intimacy: Some Reflections on the Fact that the Law Generally Does Not Protect Us Against Unwanted Gazes*, 89 GEO. L.J. 2073, 2079 (2001) ("To put it mildly, the proposal has gathered no support, and we all remain almost completely vulnerable to the state's putting pressure on most of the people with whom we are likely in fact to exchange intimacies.").

335. See Levinson, *supra* note 29, at 656 ("I suspect that most readers will greet this thought experiment with absolute disbelief, if not ridicule.").

336. FLETCHER, *supra* note 290, at 82.

337. See Levinson, *supra* note 29, at 645 ("Family relationships other than the spousal are generally not recognized as conferring testimonial privilege, although several courts have recently recognized a parent-child privilege. . . . Friendship per se goes wholly unprotected."); Baumgartel, *supra* note 36, at 107 n.134 ("Most communications among family members and friends are not privileged.").

338. See Kaufman, *supra* note 35, at 655 (asserting "the absence of friendship from the list of [protected] relationships . . . devalues that relationship"); Rosenbury, *supra* note 151, at 202 ("The values underlying state respect of intimate association . . . are present not only in marriages, parent-child relationships, or other groupings of relatives but can also be present in friendships."); cf. Harvey Gelb, *Corporate Governance and the Independence Myth*, 6 WYO. L. REV. 129, 143 (2006) ("How is a court to say that the intensity of a voluntary friendship deserves less weight than the intensity of an involuntary family relationship?"); Stern, *supra* note 119, at 625 (noting "the special recognition that the law has given to the bonds between spouses and among family members as compared to friends").

339. *Parent-Child Loyalty*, *supra* note 26, at 925 n.80 (discussing Levinson, *supra* note 29); see also *Diehl v. State*, 698 S.W.2d 712, 717 n.2 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd) (Levy, J., dissenting) (acknowledging Levinson's "innovative and stimulating discussion").

340. See, e.g., Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2135 (2001) ("I like Levinson's creative proposal of privilege tickets, which focuses on the intimacy of the relationship rather than the sensitivity of the information, although I assume that a privilege ticket could be overcome in especially egregious cases.").

Perhaps the present article will serve to generate further debate over the propriety of such a privilege.³⁴¹

341. See Leib, *supra* note 30, at 699 (“Levinson highlighted an interesting problem, whose solution may lie in further consideration of how the law could protect a friendship’s privilege of privacy. If the law developed a recognizable category of friend, perhaps we would not need to distribute tickets to figure out who is entitled to the privilege of privacy.”).